Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

OCTOBER TERM 1994

In re:

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

vs.

BANQUE NATIONALE DE PARIS,

Respondent.

NORMA ORTIZ,

Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IN A SINGLE-ASSET CHAPTER 11 CASE, IS THE CLASSIFICATION OF AN UNDERSECURED CREDITOR'S UNSECURED DEFICIENCY CLAIM SEPARATE FROM UNSECURED CLAIMS OF TRADE CREDITORS MANDATED UNDER THE BANKRUPTCY CODE?

2. SHOULD THE MANDATE OF *GREYSTONE* ("THOU SHALT NOT CLASSIFY SIMILAR CLAIMS DIFFERENTLY IN ORDER TO GERRYMANDER AN AFFIRMATIVE VOTE ON A REORGANIZATION PLAN") BE SUBORDINATED WHERE OVERRIDING LEGITIMATE REASONS FOR SEPARATE CLASSIFICATION ARE DEMONSTRATED?

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The opinion of the Second Circuit Court of Appeals appears in Appendix (Appx.) at A1.

The opinion of the United States District Court for the Southern District of New York is reported at 165 B.R. 773 (1994) and appears in Appx. at A9.

The opinion of the Bankruptcy Court is reported at 159 B.R. 695 (1993) and appears in Appx. at A27.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) which appears in Appx. at A109.

STATUTORY PROVISIONS

This case involves the following statutes which are set forth in full in the Appendix to this petition:

Statutory Provision	***Appendix***
11 U.S.C. § 1111	A109
11 U.S.C. § 1122	A110
11 U.S.C. § 1129	A111

In The

Supreme Court of the United States

OCTOBER TERM 1994

In re:

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

vs.

BANQUE NATIONALE DE PARIS,

Respondent.

NORMA ORTIZ,

Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This appeal involves two parties: (i) a debtor whose significant asset is a unique commercial office building in New York, New York and (ii) a lender who possesses a multi-million dollar lien on that property.

The petitioner herein, One Times Square Associates Limited Partnership (the "Petitioner" or "OTSA"), is a limited partnership formed under New York law. Since 1985, OTSA has owned a unique commercial office building located at One Times Square, New York, New York ("OTS"). OTS is a national landmark best known for (i) the "dropping of the ball" event on each New Year's Eve; (ii) the spectacular advertising sign displays on its exterior facade; and (iii) the traditional news "zipper" which rotates around its exterior.

On March 11, 1992 (the "Filing Date"), OTSA filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On or about May 10, 1992, Banque Arabe et Internationale D' Investissement, predecessor in interest to Banque Nationale de Paris, the respondent herein (the "Respondent" or "BNP"), filed a motion for relief from the automatic stay to enable its state court foreclosure action (the "Foreclosure Action") with respect to OTS to proceed.

On or about July 17, 1992, the Bankruptcy Court approved a stipulation which modified the automatic stay only so far as to permit BNP to proceed with the Foreclosure Action to the point of judgment. The stipulation required that if BNP sought relief from the automatic stay in order to sell OTS, it would have to return to the Bankruptcy Court. Upon information and belief, on January 8, 1993, the New York Supreme Court granted a judgment of foreclosure and sale in favor of BNP, and the judgment was entered on April 7, 1993.

Beginning on January 11, 1993, a series of hearings (collectively, the "Confirmation Hearing") were held in the Bankruptcy Court to consider confirmation of OTSA's plan of reorganization dated July 15, 1992 (the "Plan") (*see* Appx. at A60). Class 4 of the Plan consists of the $19,000,000 allowed secured claim of BNP. Class 6 of the Plan consists of general unsecured claims aggregating

approximately $11,000,000, including the $10,896,738 deficiency claim of BNP (the balance of Class 6 being small trade vendors). Class 5 of the Plan consists of the allowed unsecured claims of Spectacolor, Inc. ("Spectacolor") and Van Wagner Communications, Inc. ("Van Wagner"), sign management companies licensed by OTSA to sell advertisements on OTS, which claims arise from OTSA's rejection of executory contracts with Spectacolor and Van Wagner. The Class 5 claims of Spectacolor and Van Wagner aggregate $3,000,000.

Prior to the Confirmation Hearing, BNP did not make an election under §1111(b) of the Bankruptcy Code to treat its claim as a fully secured claim, and instead filed various objections to the Plan. At the Confirmation Hearing, a litany of testimony was adduced and evidence introduced to consider whether (i) the classification of claims in the Plan is proper; (ii) the Plan is fair and equitable with respect to each rejecting class of claims; (iii) the Plan is feasible; and (iv) the Plan complies with the new value exception to the absolute priority rule. Simultaneously with the Confirmation Hearing, BNP renewed its motion for relief from the automatic stay to proceed with the Foreclosure Action.

The case was initially brought in the United States Bankruptcy Court pursuant to jurisdiction granted to the court by 28 U.S.C. §§1334 and 157(b)(1). By memorandum decision dated October 15, 1993 (the "Bankruptcy Court Decision") (*see* Appx. at A28), the Bankruptcy Court denied confirmation of the Plan, determining that (i) the claims classification in the Plan is improper; (ii) the Plan is not fair and equitable with respect to BNP's secured claim; and (iii) although the new value exception to the absolute priority rule survived enactment of the Bankruptcy Code, OTSA's partners' capital contribution is inadequate to satisfy the exception. The Bankruptcy Court, however, determined that the Plan is feasible. The Bankruptcy Court also granted BNP's motion for relief from the automatic stay. On November 1, 1993, the Bankruptcy Court

issued an order (the "November 1, 1993 Order") (*see* Appx. at A23) consistent with the Bankruptcy Court Decision.

On November 5, 1993, Appellant filed a motion with the Bankruptcy Court for, *inter alia*, reargument/reconsideration of the November 1, 1993 Order and, in conjunction with said motion, to have the Bankruptcy Court consider the confirmability of OTSA's Alternative Plan of Reorganization *et al.* dated November 2, 1993 (the "Alternative Plan") (*see* Appx. at A85). OTSA filed the Alternative Plan when the bankruptcy court issued its opinion in *In re D&W Realty Corp.*, 156 B.R. 140 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994) (the bankruptcy court in *D&W Realty* had held that the unsecured deficiency claim of an undersecured creditor *must* be separately classified in a plan of reorganization). The Alternative Plan classifies BNP's unsecured deficiency claim alone in a separate class. The Alternative Plan also addresses the infirmities that the Bankruptcy Court believes exist with respect to the Plan concerning the fair and equitable treatment of BNP's secured claim and the new value exception to the absolute priority rule. On November 17, 1993, the Bankruptcy Court issued an order (the "November 17, 1993 Order") (*see* Appx. at A25) which, *inter alia*, granted reargument/reconsideration of the November 1, 1993 Order but adhered in all respects to the November 1, 1993 Order and the Bankruptcy Court Decision.

On November 24, 1993, OTSA filed notices of appeal from the November 1, 1993 Order and the November 17, 1993 Order to the United States District Court for the Southern District of New York (the "District Court"). By memorandum opinion and order entered on April 1, 1994 (the "District Court Decision") (*see* Appx. at A9), the District Court affirmed the November 1 and November 17, 1993 Orders on the grounds that the Bankruptcy Court's determinations with respect to the claims classification in the Plan were not clearly erroneous. A judgment consistent with the District Court Decision was entered on April 6, 1994 (*see* Appx. at A7). The District Court

did not reach the Bankruptcy Court's alternative findings with respect to the fair and equitable treatment of BNP's secured claim and the new value exception to the absolute priority rule.

On April 12, 1994, OTSA gave notice of its appeal to the United States Court of Appeals for the Second Circuit (the "Second Circuit") from the District Court Decision. On September 27, 1994, the United States Court of Appeals for the Second Circuit affirmed the District Court Decision. OTSA now request that this Supreme Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The Second Circuit in this case determined that the Debtor failed to adduce credible proof that there was a legitimate reason for the separate classification of the Class 5 claims of Spectacolor and Van Wagner and, therefore, that the Bankruptcy Court's finding that the claims classification in the Plan was a product of gerrymandering was not clearly erroneous. The reasoning of the Second Circuit was predicated on its recent prior decision in *In re Boston Post Road Limited Partnership*, 21 F.3d 477 (2d Cir. 1994). Upon information and belief, a petition for writ of certiorari to the Second Circuit has been filed by the debtor in *Boston Post Road* and is still pending. The *Boston Post Road* court held that separate classification of unsecured claims solely to create an impaired assenting class will not be permitted, and that a debtor must adduce credible proof of a legitimate reason for separate classification of similar claims. *Id.* at 483.

The Second Circuit in this case also determined that the Alternative Plan had the identical infirmities of the Plan and, therefore, that no further hearing in the Bankruptcy Court as to the merits of the Alternative Plan was necessary. Specifically, the Second Circuit stated that:

> The "alternative plan" put forward by appellant still placed the signage companies and Banque Nationale in different classes. The major wrinkle of the "alternative plan" was that it shifted some of the unsecured claims of trade creditors to Class 5—the class containing the signage company claims. Therefore, this "alternative plan" had the identical infirmities of the original plan, and no further hearing was necessary.

See Appx. at A3.

REASONS FOR GRANTING THE WRIT

IN LIGHT OF A CLEAR CONFLICT OF AUTHORITY BETWEEN THE CIRCUIT COURTS, THIS COURT SHOULD DETERMINE WHETHER IN A SINGLE-ASSET CHAPTER 11 CASE THE CLASSIFICATION OF AN UNDERSECURED CREDITOR'S UNSECURED DEFICIENCY CLAIM SEPARATE FROM UNSECURED CLAIMS OF TRADE CREDITORS IS MANDATED UNDER THE BANKRUPTCY CODE

The issue raised in this appeal is the subject of a jurisdictional split between the Circuit Courts of Appeal. The Supreme Court could resolve this disparity by granting this petition for a writ of certiorari.

During the appeal, with respect to the Alternative Plan, OTSA urged the Second Circuit to adopt the reasoning of (i) *In re Woodbrook Associates*, 19 F.3d 312 (7th Cir. 1994), (ii) *In re SM 104, Ltd.*, 160 B.R. 202, 220 (Bankr. S.D. Fla. 1993) (holding that "separate classification of unsecured deficiency claims created by

§1111(b) and general unsecured claims is not only permissible, but mandatory"), and (iii) *In re ZRM-Oklahoma Partnership*, 156 B.R. 67, 70-71 (Bankr. W.D. Okla. 1993) (holding that debtor's classification of unsecured deficiency claims separately from all other unsecured claims is allowed under the Bankruptcy Code).

In *Woodbrook*, the United States Court of Appeals for the Seventh Circuit rendered a decision rejecting the reasoning of the Fifth Circuit Court of Appeals in *In re Greystone III*, 995 F.2d 1274 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 72 (1992) and the Second Circuit in *Boston Post Road*, which relied principally on *Greystone*. The Seventh Circuit's decision in *Woodbrook*, which is in direct conflict with the Fifth Circuit's prior ruling on the same issue in *Greystone* and the Second Circuit's rulings in both *Boston Post Road* and this matter, held separate classification of an unsecured deficiency claim to be *mandatory* under the Bankruptcy Code. 19 F.3d at 319. The Alternative Plan is "four corners" with *Woodbrook*, in that it classifies BNP's unsecured deficiency claim alone in a separate class.

In *Woodbrook*, the Seventh Circuit recognized that the "one clear rule" engendered by *Greystone* ("[T]hou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan", 995 F.2d at 1279) was not an easy one to apply "since it is not about 'classifying similar claims'; it is about the debtor's purpose. Similarity is not a precise relationship, and the elements by which we judge similarity or resemblance shift from time to time in bankruptcy." 19 F.3d at 318. The *Woodbrook* court continued:

> Significant disparities do exist between the legal rights of the holder of a §1111(b) claim and the holder of a general unsecured claim which render the two claims not substantially similar and which preclude the two from being classified together under §1122(a). Thus, we cannot accept the proposition implicit in *Greystone*

> that separate classification of a §1111(b) claim is nearly conclusive evidence of a debtor's intent to gerrymander an affirmative vote for confirmation. These disparities in rights stem from the most obvious difference between the two claims: a general unsecured claim exists in all chapters of the Code, while a §1111(b) claim exists only as long as the case remains in Chapter 11 and, once converted to a Chapter 7 case, recovery is limited to its collateral. *Compare* 11 U.S.C. §103(f) with 11 U.S.C. §502(b)(1).
>
> * * *
>
> This legal difference between the two claims also can lead to anomalous results when applying other sections of the Code to a class containing both §1111(b) claimants and general unsecured claimants . . . These anomalies are all clearly set out in Judge Ginsberg's well-reasoned opinion, *In re SM 104, Ltd.*, 160 B.R. 202, 219-21 (Bankr. S.D. Fla. 1993).
>
> The drafters of the Bankruptcy Code did not intend these results. *We find that, at least where the debtor is a partnership comprised of a fully encumbered single asset, the legal rights of a §1111(b) claimant are substantially different from those of a general unsecured claimant. Accordingly, we hold that §§1111(b) and §1122(a) not only permit but require separate classification of HUD's §1111(b) unsecured deficiency claim. . .*

Id. at 319 (emphasis supplied).

The reasoning adopted by the Seventh Circuit in *Woodbrook* (and by other courts such as *SM 104* and *ZRM*) makes it clear that the Bankruptcy Code, by its very terms, requires separate classification of an undersecured creditor's unsecured claim in a Chapter 11 plan

of reorganization. There is no doubt that this issue, which is divisive amongst the Circuit Courts of Appeal, is also one that will continue to present itself. Additionally, the current divergent positions being taken by the Circuit Courts of Appeal, with no definitive pronouncement from this Court, will encourage single-asset Chapter 11 debtors to forum shop to those circuits where they will be dealt with most favorably. This is precisely the situation which 28 U.S.C. § 1254(1) is intended to address. For this reason alone, this Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the issue raised herein.

THIS COURT SHOULD DETERMINE THAT THE MANDATE OF *GREYSTONE* ("THOU SHALT NOT CLASSIFY SIMILAR CLAIMS DIFFERENTLY IN ORDER TO GERRYMANDER AN AFFIRMATIVE VOTE ON A REORGANIZATION PLAN") SHOULD BE SUBORDINATED WHERE OVERRIDING LEGITIMATE REASONS FOR SEPARATE CLASSIFICATION ARE DEMONSTRATED

During the appeal, with respect to the Plan, OTSA demonstrated several legitimate reasons (by unrefuted testimony and evidence adduced at the Confirmation Hearing), for the separate classification of the claims of Spectacolor and Van Wagner, *to wit*, (i) separate classification is justified by virtue of (a) the unique claims, objectives and/or interests of Spectacolor and Van Wagner in OTSA and (b) Spectacolor's and Van Wagner's stake in the future viability of OTSA, *see In re U.S. Truck Co.*, 800 F.2d 581, 587 (6th Cir. 1986); (ii) separate classification is justified by good business reasons and is in the best interests of creditors, *see In re Briscoe Enterprises, Ltd.*, 994 F.2d 1160 (5th Cir.), *cert. denied*, 1993 WL 417964 (1993); (iii) separate classification is justified by the litigation between the Debtor, Spectacolor and Van Wagner, *see In re Uniroyal Plastics Acquisition Corp.*, Case No. 91-33154 (Bankr.

N.D. Ind. 1993); and (iv) separate classification is justified by Van Wagner's substantial infusion of funds to OTSA's reorganization effort, *see In re Atlanta West VI*, 91 B.R. 620, 626 (Bankr. N.D. Ga. 1988). OTSA also demonstrated that, as a factual matter, it did not gerrymander an affirmative vote on the Plan. Assuming, *arguendo*, OTSA gerrymandered the vote on the Plan (pursuant to the rationale of *Greystone*), that should subordinate itself where valid, legitimate reasons for separate classification are demonstrated.

This Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit due to the failure of the courts below to subordinate the mandate of *Greystone* given the overriding demonstrated legitimate reasons for the separate classification of Spectacolor and Van Wagner in the Plan.

CONCLUSION

The order of a writ of certiorari should be issued in light of the conflict which has emerged from United States Courts of Appeal which have reached the issue of separate classification under §§1122(a) and 1111(b) of the Bankruptcy Code. This Court should grant this petition for a writ of certiorari to determine which analysis is correct and to resolve a growing jurisdictional disparity. This Court should also grant this petition in light of the failure of the courts below to subordinate the mandate of *Greystone* given the overriding demonstrated legitimate reasons for the claims classification in the Plan.

Dated: December 21, 1994

Respectfully Submitted,

The Petitioner,
One Times Square Associates Limited Partnership

By: J. Stanley Shaw

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APPENDICES

APPENDIX A

SDNY

93-cv-8477 93-cv-8476 Cedarbaum

RKW

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the twenty seventh day of September, one thousand nine hundred and ninety-four.

Present: Honorable Ralph K. Winter,
Honorable Dennis G. Jacobs,
Honorable Jose A. Cabranes,
Circuit Judges.

Stamp/United States Court Of Appeals
Second Circuit, Filed Sept 27 1994
George Lange III, Clerk

IN RE: ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor,

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

BANQUE NATIONALE DE PARIS,

Defendant-Appellee.

ORDER # 94-5028

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

One Times Square Associates Limited Partnership appeals from Judge Cedarbaum's affirmance of Bankruptcy Judge Blackshear's grant of a motion by Banque Nationale de Paris ("Banque Nationale") to lift the automatic stay in the Chapter 11 reorganization of One Times Square Associates Limited Partnership. The stay would be lifted to allow Banque Nationale to foreclose its mortgage on the office building located at one Times Square. The district court upheld the bankruptcy court on the ground that the reorganization plan submitted by appellant deliberately "gerrymandered" the classes of claims in order to create an impaired class that would vote for the plan and, therefore, the bankruptcy court did not abuse its discretion in lifting the automatic stay.

Appellant claims: (i) the classification of classes was proper and undertaken with no intent to "gerrymander," (ii) the district court should have reached the bankruptcy court's alternative grounds, and (iii) the district court should have ruled that the bankruptcy court erred in failing to conduct a hearing on an alternative reorganization plan.

This court recently held in In re Boston Post Road Limited Partnership, 21 F.3d 477, 483 (2d Cir. 1994), "that separate classification of unsecured claims solely to create an impaired assenting class will not be permitted." A separate classification must be supported with credible proof that there was a legitimate reason for the separation.

It is clear in the instant case that Class 5 was created as an impaired class solely because it would vote for the plan. Class 5 contained signage companies with claims that were small in relation to those of Banque Nationale. These signage companies had business interests different from those of the bank, although the nature of their bankruptcy claims was the same. If the signage companies had been placed with the other unsecured claims, then Banque Nationale would have had voting power over the entire class. However, the reorganization plan put the signage companies in a different class so that, according to the testimony of appellant's property manager, an unsecured class would vote for the reorganization plan. Under Boston Post Road, we have no alternative but to affirm the district court because the bankruptcy court's finding is supported by the record and is not clearly erroneous. See In re Financial News Network. Inc., 980 F.2d 165, 169 (2d Cir. 1992).

Appellant adduces a number of possible business reasons for the placement of the signage companies claims in a different class. However, these putative reasons fail to convince us that Bankruptcy Judge Blackshear's finding that the classification scheme was a product of "gerrymandering" was erroneous.

As the classification scheme is fatal to the plan, there was no need for the district court, or for us, to reach the bankruptcy court's alternative findings regarding (i) the fair and equitable treatment of Banque Nationale's secured claim and (ii) the reorganization plan's compliance with the absolute priority rule.

The "alternative plan" put forward by appellant still placed the signage companies and Banque Nationale in different classes. The major wrinkle of the "alternative plan" was that it shifted some of the unsecured claims of trade creditors to Class 5 — the class containing the signage company claims. Therefore, this "alternative plan" had the identical infirmities of the original plan, and no further hearing was necessary.

Bankruptcy Judge Blackshear did not abuse his discretion by lifting the stay. The stay may be lifted if the debtor holds no equity in the property at issue and if the property is not needed for a reorganization. 11 U.S.C. § 362(d)(2) (1988). Appellant acknowledges that it holds no equity in the building. The instant case is a single asset bankruptcy case in which Banque Nationale holds a large mortgage, giving the bank voting control over both the secured and the unsecured classes claims in any Chapter 11 proceedings. As appellant will not be permitted to "gerrymander" Banque Nationale out of its voting power, a reorganization appears unlikely. Consequently, there is no "reasonable possibility of a successful reorganization within a reasonable period of time." United States Savs. Assn v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 376 (1988). Under these circumstances, the property is not necessary to the reorganization under § 362(d)(2). In re 266 Washington Assocs., 141 B.R. 275, 287 (Bankr. E.D.N.Y.), aff'd, 147 B.R. 827 (E.D.N.Y. 1992).

Affirmed. signature/Hon. Ralph K. Winter, U.S.C.J.
signature/Hon. Dennis G. Jacobs, U.S.C.J.
signature/Hon. Jose A. Cabranes, U.S.C.J.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

A5

SDNY

93-cv-8477 93-cv-8476 Cedarbaum

RKW

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the twenty-seventh day of September, one thousand nine hundred and ninety-four.

Present: Honorable Ralph K. Winter,
Honorable Dennis G. Jacobs,
Honorable Jose A. Cabranes,
Circuit Judges.

Stamp/ United States Court Of Appeals
Second Circuit Filed Sept 27 1994
George Lange III, Clerk

IN RE: ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor,

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

BANQUE NATIONALE DE PARIS,

Defendant-Appellee.

ORDER # 94-5028

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged. and decreed that the judgment of said District Court be and it hereby is affirmed.

Label/Issued as Mandate

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

In re

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Appellant,

-against-

BANQUE NATIONALE DE PARIS,

Appellee.

93 CIVIL 8476 (MGC)
93 CIVIL 8477(MGC)

JUDGMENT

Stamp/ U.S. District Court
S.D. of N.Y. Filed Mar 31 1994

The Debtor having appealed from an order entered by the bankruptcy court on November 1, 1993, and granting the motion of the largest creditor, Banque Nationale de Paris, to lift the automatic stay, the debtor having also appealed from an order entered on November 17, 1993, in which the bankruptcy court granted reconsideration of, and adhered to, its November 1, order, and the said appeal having come before the Honorable MIRIAM

GOLDMAN CEDARBAUM, United States District Judge, and the Court thereafter on March 31, 1994, having rendered its memorandum opinion and order (#72987); affirming the Bankruptcy Court's Orders of November l, 1993 and November 17, 1993, it is,

ORDERED, ADJUDGED AND DECREED: That the Bankruptcy Court's Orders of November 1, 1993 and November 13, 1993 be and they are hereby affirmed for the reasons stated in the Court's Memorandum Opinion and Order, dated March 31, 1994.

DATED: New York, New York
March 31, 1994

signature/James M. Parkison
Clerk

By: signature/Ronald A. Church
Deputy Clerk

Stamp/Microfilm April 01 1994, 3:00 pm

APPENDIX C

In re

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Appellant,

v.

BANQUE NATIONALE DE PARIS,

Appellee.

Nos. 93 Civ. 8476 (MGC), 93 Civ. 8477 (MGC).
United States District Court, S.D. New York.
March 31, 1994.

Mortgagee moved for relief from stay to exercise its rights in mortgaged property, based on debtor's admitted lack of equity in property and limited prospects of reorganizing. The Bankruptcy Court, Cornelius Blackshear, J., 159 B.R. 695, entered order lifting stay, and debtor appealed. The District Court, Cedarbaum, J., held that debtor lacked sufficient prospects of successfully reorganizing without impermissibly gerrymandering classes, and stay could accordingly be lifted based on debtor's lack of equity in property.

Affirmed.

1. Bankruptcy 3782

Bankruptcy court's conclusions of law are reviewed de novo.

2. Bankruptcy 3784

Bankruptcy court's decision to grant relief from automatic stay may be overturned only for abuse of discretion. Bankr.Code, 11 U.S.C.A. § 362(d).

3. Bankruptcy 2424

Automatic stay would be lifted, based on debtor's lack of equity in property on which mortgagee sought to foreclose, where debtor could not obtain confirmation of plan except by impermissibly gerrymandering classes to obtain acceptance of plan by at least one impaired class. Bankr.Code, 11 U.S.C.A. § 362(d)(2), 1129(b).

4. Bankruptcy 3550

Unsecured portion of undersecured mortgage claim could not be classified separately, in Chapter 11 plan, from claims of general unsecured creditors merely for purpose of creating impaired class that would vote in favor of plan for purposes of obtaining confirmation under cramdown provisions. Bankr.Code. 11 U.S.C.A. § 1129(b).

5. Bankruptcy 3550

Mutual desire on part of Chapter 11 debtor and its unsecured trade creditors to continue their business relationship did not provide basis for separate classification of unsecured trade claims, apart from unsecured portion of undersecured mortgage claim.

6. Bankruptcy 3550

In deciding whether Chapter 11 debtor had legitimate reason for separately classifying unsecured claim of creditor who agreed to make cash contribution to estate, bankruptcy court could not accept debtor's statement at face value, but had to scrutinize debtor's motives to ensure that separate classification was not in fact

motivated by desire to gerrymander classes to obtain confirmation of plan under cramdown provisions; fact that contributing creditor was to receive less favorable treatment under plan than other unsecured creditors did not support debtor's contention that creditor's contribution was reason for its separate classification. Bankr.Code, 11 U.S.C.A. § 1129(b).

Shaw, Licitra, Parente, Esernio & Schwartz, P.C., By J. Stanley Shaw, Craig A. Damast, Garden City, NY, for appellant.

LeBoeuf, Lamb, Greene & MacRae, By John S. Kinzey, John P. Campo, Timothy W. Walsh, New York City, for appellee.

OPINION

CEDARBAUM, District Judge.

One Times Square ("OTS" or the "Debtor"), a limited partnership, appeals from an order entered by the bankruptcy court on November 1, 1993, granting the motion of the largest creditor, Banque Nationale de Paris ("BNP"), to lift the automatic stay. The Debtor also appeals from an order entered on November 17, 1993, in which the bankruptcy court granted reconsideration of, and adhered to, its November 1 order. BNP had already obtained a judgment of foreclosure against the Debtor's only asset, the building and real property at One Times Square. It moved to lift the automatic stay so that it could proceed with a foreclosure sale. The bankruptcy court's decision to lift the automatic stay was based on its finding that the proposed plan of reorganization (the "Plan") could not be confirmed. The Debtor challenges each of the three grounds on which the bankruptcy court's rejection of confirmation was based.

For the reasons discussed below, the bankruptcy court did not abuse its discretion in granting BNP's motion to lift the automatic stay. Therefore, the orders appealed from are affirmed.

Background

The Debtor's only asset is the building and real property at One Times Square. BNP has a security interest in all rents, profits, proceeds and contractual rights arising out of this property pursuant to a mortgage agreement executed on March 14, 1989. On October 17, 1991, after OTS defaulted on its loan, BNP instituted foreclosure proceedings against the property in New York State Supreme Court. On March 11, 1992, the Debtor filed a voluntary Chapter 11 petition. At that time, the property was valued at $19 million and was encumbered by BNP's mortgage in the amount of approximately $30 million. On July 17, 1992, the Debtor and BNP agreed to modify the automatic stay to allow BNP to continue its foreclosure proceedings to entry of judgment, and then to return to the bankruptcy court for permission to proceed with a foreclosure sale. A judgment of foreclosure was entered against the property on April 8, 1993.

In the Chapter 11 proceedings, BNP did not elect to have its entire claim treated as secured pursuant to 11 U.S.C. § 1111(b)(2), but filed a secured claim of $19 million, and an unsecured deficiency claim of approximately $11 million. The Debtor's only other significant creditors are Van Wagner Communications, Inc. and Spectacolor, Inc., two sign management companies which had agreements (the "signage agreements") with OTS to lease advertising space on its exterior walls. Their claims are unsecured and arise out of the Debtor's rejection of their signage agreements which resulted in damages totalling approximately $3 million.

The Plan, which was ultimately rejected by the bankruptcy court, created three impaired voting classes: Class 4, which included BNP's $19 million secured claim; Class 5, which comprised the unsecured claims of Spectacolor and Van Wagner totalling $3 million; and Class 6, which comprised BNP's $11 million unsecured deficiency claim and approximately $200,000 in unsecured claims of small trade vendors. Classes 4 and 6 voted to reject the plan; Class

5 voted in its favor. The Debtor sought confirmation of the Plan under the cramdown provisions of § 1129(b).

After a ten-day hearing, Judge Blackshear denied confirmation of the Plan on three separate grounds. First, the court found that the motive behind the Debtor's decision to create a separate class for the unsecured claims of Van Wagner and Spectacolor was to guarantee that at least one impaired class would vote to approve the Plan. the court found that this "gerrymandering" was impermissible under §§ 1122(a) & 1129(a)(1) of the Code. Second, the court found that the Plan was not "fair and equitable" to Class 4, as required under § 1129(b)(2)(A)(i)(II), because the proposed interest rate was inadequate. Third, the court found that the Plan violated the absolute priority rule of § 1129(b)(2)(B)(ii) because the "new value" to be contributed by the limited partners was insufficient in relation to the interest they would retain under the Plan. The Debtor challenges each of these conclusions. The bankruptcy court's finding that the Plan is feasible has not been challenged by either party.

Discussion

A. Standard of Review

[1,2] The bankruptcy court's "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed.R.Bankr.P. 8013 (1994). Conclusions of law shall be reviewed de novo. *Chase Manhattan Bank v. Third Eighty-Ninth Associates (In re Third Eighty-Ninth Associates)*, 138 B.R. 144.146 (S.D.N.Y.1992). The bankruptcy court's decision to grant relief from the automatic stay may be overturned only upon a finding that the bankruptcy court abused its discretion. *Sonnax Industries, Inc. v. Tri-Component Products Corp. (In re Sonnax Industries, Inc.)*, 907 F.2d 1280, 1286 (2d Cir.1990).

B. Standard for Lifting the Automatic Stay

[3] Section 362(d)(2) provides that a creditor is entitled to relief from the automatic stay with respect to certain property if the Debtor has no equity in that property and the property "is not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2). In light of BNP's secured claim of approximately $30 million against property now valued at only $19 million, the Debtor has acknowledged that it has no equity in the property.

The second element, that is, whether the property is "necessary to an effective reorganization," is hotly disputed. Although the property in question here is the Debtor's only asset, it is not automatically deemed necessary to an effective reorganization. The Supreme Court has interpreted this provision to require:

> [N]ot merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means... that there must be a reasonable possibility of a successful reorganization within a reasonable period of time.

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-76, 108 S.Ct. 626, 633, 98 L.Ed.2d 740 (1988) (citations omitted); *see In re 500 Fifth Avenue Associates*, 148 B.R. 1010, 1015-16 (Bankr.S.D.N.Y.), *aff'd.* 1993 WL 316183 (S.D.N.Y.1993).

A successful reorganization can be accomplished in one of two ways. A plan for reorganization may be agreed upon by all impaired classes, pursuant to § 1129(a)(8), or it may be approved through the use of the cramdown provisions of § 1129(b) to confirm a plan over the objections of dissenting classes. The Debtor and BNP were unable to agree upon an acceptable plan for reorganization over the course of twenty months. Therefore, the Debtor's only reasonable

chance for a successful reorganization would be through the use of the cramdown provisions to confirm the Plan over BNP's objections. If the bankruptcy court was correct in determining that a cramdown is not feasible, then the property is not necessary to an effective reorganization and the court was within its discretion to lift the stay. *In re 500 Fifth Avenue*, 148 B.R. 1015-16, 1021; *In re 266 Washington Associates*, 141 B.R. 275, 287 (Bankr.E.D.N.Y.) *aff'd*, 147 B.R. 827 (E.D.N.Y.1992).

C. Classification

[4] The bankruptcy court's conclusion that the Plan could not be confirmed under the cramdown provisions rested primarily on its finding that the Debtor's proposed classification scheme was an impermissible attempt to manipulate the vote. The Debtor challenges both the court's legal conclusion that gerrymandering is impermissible under the Code and its factual finding that the Debtor's motive in separately classifying the claims of Van Wagner and Spectacolor was to gerrymander to achieve an affirmative vote.

According to the cramdown provisions of the Code, only one assenting class of impaired claims is needed to confirm a plan over the dissent of the other classes. 11 U.S.C. §§ 1129(a)(10), 1129(b). For a class of claims to accept a plan, more than one-half in number and at least two-thirds in amount of claims must vote in favor of the plan. 11 U.S.C. § 1126(c). The decision to put certain claims in separate classes can thus affect the outcome of the vote.

For example, had the Debtor placed all unsecured claims in a single class, BNP could have dominated the voting since its $11 million unsecured claim comprises more than two-thirds of the total amount of the unsecured claims against the Debtor. The central dispute here arose when the Debtor chose to place the $3 million unsecured claims of Van Wagner and Spectacolor in a different class from the $11 million unsecured claim of BNP, thereby giving Van Wagner and Spectacolor the ability to vote separately from BNP.

Section 1122(a) governs the Debtor's classification of claims. On its face, this section requires only that the claims in a particular class be "substantially similar," and not that all substantially similar claims be placed in one class. 11 U.S.C. § 1122(a). However, courts have held that while a debtor has a certain degree of flexibility in classifying claims, its discretion is limited by the principle that classification may not be used for the sole purpose of manipulating the vote. The court in *In re 266 Washington Associates* stated:

> '[T]here must be some limit on a debtor's power to classify creditors in such a manner [to assure that at least one class of impaired creditors will vote for the plan and make it eligible for cramdown consideration by the court]. The potential for abuse would be significant otherwise. Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.'

141 B.R. at 283 (quoting *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir.1986)); *see John Hancock Mutual Life Insurance Co. v. Route 37 Business Park Associates*, 987 F.2d 154, 158 (3rd Cir.1993); *Phoenix Mutual Life Insurance Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1277 (5th Cir.1991), *cert. denied*, — U.S. —, 113 S.Ct. 72, 121 L.Ed.2d 37 (1992) ("Classification of claims... affects the integrity of the voting process, for, if claims could be arbitrarily placed in separate classes, it would almost always be possible for the debtor to manipulate 'acceptance' by artful classification.")

Courts have thus imposed on debtors the requirement that substantially similar claims be classified together unless there exists some reason, other than gerrymandering, for separating them. *See*

In re Greystone III Joint Venture, 995 F.2d at 1279; *In re 266 Washington Associates*, 141 B.R. at 283. The bankruptcy court followed this general rule and found that the classification scheme proposed by the Debtor was impermissible because there was no legitimate reason for separately classifying the unsecured claims of Van Wagner and Spectacolor from the other unsecured claims.

The Debtor argues that § 1122(a) does not prohibit gerrymandering and that policy considerations support its right to classify claims to promote its efforts to reorganize. Otherwise, the Debtor argues, the large size of BNP's unsecured deficiency claim would effectively give BNP the power unilaterally to veto any plan for reorganization that the Debtor might propose. The Debtor relies on three cases for the proposition that gerrymandering is permitted under the Code: *In re D & W Realty Corp.*, 156 B.R. 140 (Bankr.S.D.N.Y.1993); *In re SM 104, Ltd.*, 160 B.R. 202 (Bankr.S.D.Fla.1993); and *In re ZRM-Oklahoma Partnership*, 156 B.R. 67 (Bankr.W.D.Okla.1993). The *D & W Realty* court stated that the Code not only permits the separate classification of a secured creditor's unsecured deficiency claim but requires it. 156 B.R. at 141. This decision has recently been reversed. *See In re D & W Realty Corp.*, 165 B.R. 127 (S.D.N.Y.1994).

Although reorganization efforts should be encouraged, the Code does not give debtors an absolute right to a cramdown. Section 1129(a)(10) requires that at least one impaired class of claims accept a plan before the other classes can be forced to accept it. As the *In re 266 Washington Associates* court stated:

Section 1129(a)(10) operates as a statutory gatekeeper barring access to cramdown where there is absent even one impaired class accepting the plan. Cramdown is a powerful remedy available to plan proponents under which dissenting classes are compelled to rely on difficult judicial valuations, judgments, and determinations. The policy underlying Section 1129(a)(10) is that before embarking upon the tortuous path of cramdown and compelling the target of

cramdown to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan.

141 B.R. at 287. Allowing a debtor to manipulate the voting by creating a class that is certain to favor a plan effectively nullifies the threshold requirement that at least one impaired class accept the plan.

The fact that the size of BNP's claim gives it the power to "veto" the Plan does not mean that the Debtor's hopes for reorganization have been unfairly denied. The Code's voting requirements recognize that those creditors with larger claims deserve a greater voice in deciding whether or not a debtor's plan for reorganization is acceptable. BNP, by deciding not to make a § 1111(b)(2) election, chose to have an $11 million unsecured deficiency claim—and, with this claim, a powerful voice among the unsecured creditors. *See In re 500 Fifth Avenue Associates*, 148 B.R. at 1021 ("The purpose of the section 1111(b) election is to allow the undersecured creditor a right to potentially dominate the vote within the unsecured class; the larger the nonrecourse claim, the larger that claimant's voice sounds."); *In re 266 Washington Associates*, 141 B.R. at 285; *In re Greystone III Joint Venture*, 995 F.2d at 1280. The Debtor may not avoid this result by placing smaller unsecured claims in a separate class to diminish the effect of BNP's vote.

The Debtor also challenges the bankruptcy court's factual determination that its motive in separately classifying the claims of Van Wagner and Spectacolor was, in fact, to gerrymander rather than to further other legitimate ends. The bankruptcy court, after listening to ten days of testimony and reviewing the relevant documents, found that the Debtor rejected the signage agreements of Van Wagner and Spectacolor "solely to create a separate, non-insider, impaired class guaranteed to accept the Plan." *In re One Times Square Associates Limited Partnership*, 159 B.R. 695, 705 (Bankr.S.D.N.Y.1993). The court relied primarily on the testimony

of Arthur Nevid, property manager for the Debtor, who testified that the Plan separately classified the claims of Van Wagner and Spectacolor because "we were advised by counsel that we were able to reject those contracts, rejecting those contracts would create them as creditors and that would enhance—that would enable us to have a plan that would be confirmable." (Record, Vol. III, at 1486-87.)

The Debtor asserts that is did not reject the signage agreements and thereby create the unsecured claims of Van Wagner and Spectacolor for the purpose of establishing an impaired class to affirm the Plan. The Debtor also argues that it had valid reasons for the separate classification which the bankruptcy court "either failed to consider or appreciate." (Debtor's Mem. at 40.) It is unnecessary to decide whether the Debtor had improper reasons for creating the unsecured claims of Van Wagner and Spectacolor. Although it would not have been possible for the Debtor to gerrymander in this case without first rejecting the signage agreements, the critical issue is whether the Debtor's motive in putting the claims of Van Wagner and Spectacolor in a separate class was to gerrymander.

[5] With respect to its effort to justify the separate classification of the claims of Van Wagner and Spectacolor, the Debtor first argues that Van Wagner and Spectacolor have a unique interest in OTS. *See In re U.S. Truck Co., Inc.*, 800 F.2d 581 (6th Cir.1986). According to the Debtor, the claims of Van Wagner and Spectacolor are unique because the signage agreements provide over one-half of OTS' income and because their interests will be extinguished if BNP is allowed to proceed with foreclosure.

However, "[s]uch a rationale improperly focuses on the motives and agenda of the claim holder rather than on the nature of the underlying claim." *In re 500 Fifth Avenue*, 148 B.R. at 1019. The general rule is that "unsecured creditors hold substantially similar claims; they are claimants of equal legal rank entitled to share pro rata in values remaining after payment of secured and priority claims." *In re 266 Washington Associates*, 141 B.R. at 282 (quoting

In re Pine Lake Village Apartment Co., 19 B.R. 819, 830 (Bankr.S.D.N.Y.1982); *see In re 500 Fifth Avenue*, 148 B.R. at 1019. The Debtor argues that the claims of Van Wagner and Spectacolor are distinct from the claim of BNP because BNP has an interest in foreclosing on the property, whereas Van Wagner and Spectacolor have an interest in continuing to do business with the Debtor. While these divergent interests may create different incentives in voting, they cannot serve as a justification for separate classification.

Second, the Debtor argues that good business reasons justify separate classification. The Debtor relies on *Heartland Federal Savings & Loan Association v. Briscoe Enterprises, Ltd. (In re Briscoe Enterprises, Ltd.)*, 994 F.2d 1160 (5th Cir.), *cert. denied*,— U.S. —, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993), in which the court authorized separate classification for a city's claim because it found that the debtor's relationship with the city, which provided rental assistance to many of the people who lived in the debtor's apartments, was "essential" to the continued business of the debtor. 994 F.2d at 1167. The court was careful to "emphasize the narrowness of this holding." *Id.* The Debtor argues that it shares with Van Wagner and Spectacolor an interest in maintaining business relations. However, it has not been suggested that Van Wagner and Spectacolor are essential to OTS' ongoing business. In fact, the transcript of the confirmation hearing reveals that there are other signage companies which might be interested in doing business with the Debtor. (Record, Vol. III, at 1349-50; 1489-91.) As stated above, the mere fact that Van Wagner and Spectacolor would like to continue to do business with the Debtor cannot serve as a justification for separate classification.

[6] Finally, the Debtor relies on *In re Atlanta West VI*, 91 B.R. 620 (Bankr.N.D.Ga.1988), for the proposition that Van Wagner's commitment to contribute $720,000 to the Debtor to facilitate the implementation of the Plan justifies its separate classification.

However, the *Atlanta West* court, in approving the separate classification of, and more favorable treatment to, an unsecured creditor who agreed to advance a new loan to the debtor, cautioned that a debtor's motives must be scrutinized to prevent the possibility of vote manipulation. 91 B.R. at 626. The fact that Van Wagner, in exchange for its $720,000 contribution, was to receive *less* favorable treatment under the Plan than the unsecured creditors in Class 6, does not support the Debtor's contention that Van Wagner's contribution was the reason for its separate classification.

Conclusion

The bankruptcy court's factual findings that the classification of unsecured claims was for the purpose of gerrymandering and that without gerrymandering a cramdown is not feasible were not clearly erroneous. The bankruptcy court's legal conclusion that gerrymandering is impermissible is affirmed. Since a cramdown is not feasible, the Debtor's property is not necessary to an effective reorganization and the bankruptcy court's decision to lift the automatic stay was not an abuse of discretion.

In view of my affirmance of the bankruptcy court's finding that a cramdown is not feasible, it is unnecessary to reach the bankruptcy court's alternative findings with respect to the fair and equitable standard and the new value exception. The Debtor's contention that the bankruptcy court failed to make specific findings of fact and conclusions of law relates only to these findings and is therefore not considered.

Finally, there is no merit in the Debtor's argument that the bankruptcy court improperly adhered to the November 1 order and erred in failing to hold hearings on a new plan proposed in its motion for reconsideration. The Debtor's only realistic route to a successful reorganization would be through a cramdown. But the Debtor needs the impermissible classification scheme to effect a cramdown. Thus, no plan proposed by the Debtor would be feasible, and the

bankruptcy court was correct in adhering to its original order to deny confirmation and to lift the automatic stay.

For the foregoing reasons, the bankruptcy court's orders of November 1, 1993 and November 17, 1993 are affirmed.

SO ORDERED.

APPENDIX D

United States Bankruptcy Court

SOUTHERN DISTRICT OF NEW YORK

In re:

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

Chapter 11
Case No. 92 B 41471 (CB)

ORDER DENYING CONFIRMATION OF DEBTOR'S PLAN OF REORGANIZATION AND GRANTING RELIEF FROM THE AUTOMATIC STAY

Upon consideration of the plan of reorganization (the "Plan") filed by One Times Square Limited Partnership (the "Debtor") on July 15, 1992; and upon the objections filed by Banque Arabe et Internationale d'Investissement (the "Bank") to confirmation of the Plan; and upon the motion by the Bank seeking, *inter alia*, relief from the automatic stay to permit advertisement and sale of the property known as One Times Square, New York, New York (the "Property") or, in the alternative, dismissal of the case (the "Bank's Motion"); and upon all of the supporting affidavits, memoranda of law and other papers filed in connection with confirmation of the Plan and the Bank's Motion; and oral argument of counsel having been heard; and evidentiary hearings having been held with respect to all factual matters; and post-trial briefs having been filed by the parties; and after due deliberation; and sufficient cause appearing; and in accordance with this Court's Memorandum of Decision on Confirmation of the Debtor's Plan of Reorganization, dated October 15, 1993 and for the reasons set forth therein; it is hereby

ORDERED, that confirmation of the Plan is denied; and it is further

ORDERED, that the Bank's Motion is granted to the extent it seeks relief from the automatic stay pursuant to section 362(d) of the Bankruptcy Code; and it is further

ORDERED, that the Stipulations between the Debtor and Spectacolor and the Debtor and VanWagner are hereby approved and deemed so ordered by this Court.

Dated: November 1, 1993
New York, New York

signature/Cornelius Blackshear
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX E

United States Bankruptcy Court

SOUTHERN DISTRICT OF NEW YORK

In re

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

Chapter 11
Case No. 92 B 41471 (CB)

ORDER

Upon consideration of the motion for (i) Reargument and Reconsideration of this Court's order dated November 1, 1993 (the "November 1, 1993 Order") pursuant to Bankruptcy Rule 9023 and (ii) Stay Pending Appeal pursuant to Bankruptcy Rule 8005, with supporting application, dated November 5, 1993 (the "Application"), filed by the debtor, One Times Square Associates Limited Partnership (the "Debtor"), and the Debtor's Alternative Plan of Reorganization dated November 2, 1993 (the "Alternative Plan"), annexed as Exhibit "A" to the Application (collectively, the "Motion"); and after due deliberation on the Motion and the oral argument presented by the Debtor and Banque Nationale de Paris (the "Bank") at the hearing held on the Motion on November 17, 1993; it is hereby

ORDERED, that the Motion is granted to the extent that it seeks reconsideration of the November 1, 1993 Order, which (i) denied confirmation of the Debtor's plan of reorganization dated July 15, 1992 and (ii) vacated the automatic stay in favor of the Bank; and it is further

ORDERED, that based on this Court's granting of the Motion for Reargument and Reconsideration of the November 1, 1993 Order, including a consideration of the Alternative Plan annexed as Exhibit "A" to the Application, the Court declines to modify either its Memorandum of Decision dated October 15, 1993 on Confirmation of the Debtor's Plan of Reorganization (the "Memorandum Decision") or the November 1, 1993 Order, and adheres, in all respects, to the Memorandum Decision and the November 1, 1993 Order pursuant to their original terms; and it is further

ORDERED, that the Motion with respect to granting a stay pending an appeal pursuant to Bankruptcy Rule 8005, is adjourned to December 7, 1993 at 9:45 without prejudice to the Debtor's right to have such stay application heard and decided promptly by this Court if the United States District Court does not grant an expedited appeal of this Order and the underlying Memorandum Decision and the November 1, 1993 Order, or if the Bank seeks to proceed during the pendency of the appeal with a foreclosure sale of the Debtor's property.

Agreed and consented to:
By: signature/Stuart I. Gordon
Stuart I. Gordon (SIG-3536)
Shaw, Licitra, Parente, Esernio &
Schwartz, P.C.
Attorneys for the Debtor

Agreed and consented to:
By: signature/John P. Campo
John S. Kinzey (JSK-4951)
John P. Campo (JPC-5241)
LeBoeuf, Lamb, Leiby & MacRae
Attorneys for the Bank

Dated: New York, New York
November 17, 1993

signature/Cornelius Blackshear
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX F

In re

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

Bankruptcy No. 92 B 41471 (CB)

United States Bankruptcy Court, S.D. New York.

Oct. 15, 1993.

Creditor-bank objected to proposed Chapter 11 plan of reorganization based upon alleged improper classification of claims, failure to provide creditor with fair and equitable treatment, violation of absolute priority rule, and lack of feasibility. The Bankruptcy Court, Cornelius Blackshear, J., held that: (1) legal nature of claims arising out of rejection by debtor of executory contracts were not unique, and separate classification of claims was not justified so that plan of reorganization violated classification requirements of Bankruptcy Code; (2) interest rates contemplated by Plan did not reasonably reflect potential risks to be borne by bank, and thus, plan violated fair and equitable requirements for cramdown; (3) proposed capital contributions of limited partners of debtor was not proportionate to interests they would retain under plan and failed to meet requirements of new value exception; and (4) plan was feasible.

Objection sustained; confirmation denied.

1. Bankruptcy 2126

Bankruptcy Code provision authorizing bankruptcy court to issue any order, process, or judgment necessary or appropriate to carry out provisions of Title 11 should be used sparingly and then only to supplement Bankruptcy Code, not supplant Code. Bankr. Code, 11 U.S.C.A. §105(a).

2. Bankruptcy 3550

Claims of creditors resulting from proposed rejection by Chapter 11 debtor of current signage agreements were properly characterized as general unsecured claims, and neither nature of creditors' business, nature of debtor's assets or mechanics of creditors' claims sufficiently justified separate classification, and thus, Chapter 11 plan would not be confirmed due to its violation of classification requirements of Bankruptcy Code. Bankr.Code. 11 U.S.C.A. §§ 1122(a), 1129(a)(1).

3. Bankruptcy 3550

Generally, for classification of claims purposes, unsecured creditors are claimants of equal rank, entitled to share, pro rata, in values remaining after payment of secured and priority claims.

4. Bankruptcy 3550

Unsecured creditors will ordinarily comprise one class, whether trade, tort, publicly held debt or deficiency of secured creditor.

5. Bankruptcy 3550

Broad reading of Bankruptcy Code does not require all similarly situated claims to be classified together; statute on its face merely requires that claims classified together be substantially similar, and thus, debtor is allowed some discretion when classifying unsecured claims. Bankr.Code, 11 U.S.C.A. § 1122(a).

6. Bankruptcy 3550

Separate classification of substantially similar unsecured claims will be allowed only when there is reasonable basis for doing so, or, in other words, when decision to separately classify does not offend one's sensibility of due process and fair play. Bankr.Code, 11 U.S.C.A. § 1122(a).

7. Bankruptcy 3550

Generally, claims resulting from rejection of executory contracts are legally similar to general unsecured claims.

8. Bankruptcy 3550

Uniqueness of underlying legal nature of creditor's claim as it relates to assets of debtor is independent reason for which court may permit separate classification. Bankr.Code, 11 U.S.C.A. § 1122(a).

9. Bankruptcy 3563.1

Interest rates contemplated by Chapter 11 plan of reorganization did not reasonably reflect potential risks to be borne by creditor-bank in light of evidence that debtor could not obtain loan in marketplace for 100% loan to value ratio under terms it was proposing under plan, and thus, plan was not fair and equitable to bank for purpose of cramdown. Bankr.Code, 11 U.S.C.A. § 1129(a)(8), (b)(l), (b)(2)(A)(i)(II).

10. Bankruptcy 3564

To satisfy fair and equitable requirement for cramdown with respect to secured claim, claim holder must retain its lien and receive deferred cash payments totaling at least allowed amount of such claim, of a value, as of effective date of plan, of at least value of such holder's interest in estate's interest in such property. Bankr. Code, 11 U.S.C.A. § 1129(b)(2)(A)(i)(I, II).

11. Bankruptcy 3564

Applying second requirement for satisfying fair and equitable requirement for cramdown with respect to secured claim, i.e., that claim holder receive deferred cash payments totaling at least allowed amount of such claim, of value, as of effective date of plan, of at least value of such holder's interest in estate's interest in such property, secured creditor must retain its liens on property and deferred payments must be discounted at interest rate which is sufficient to compensate creditor for time value of money. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(A)(i)(I, II).

12. Bankruptcy 3564

Proper interest rate to compensate creditor for deferred payments under Chapter 11 plan of reorganization is current market rate for loans which are similar in term, quality of security, and risk of repayment or financial condition of borrower. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(A)(i)(I, II).

13. Bankruptcy 3561

New value exception to absolute priority rule survived enactment of Bankruptcy Code; new value exception was recognized exception to absolute priority rule under Bankruptcy Act, and Bankruptcy Code provision codifying absolute priority rule does not completely forbid old equity from retaining property. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii).

14. Bankruptcy 3561

Neither Supreme Court nor Second Circuit has ruled on issue of continued existence of new value exception to absolute priority rule. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii).

15. Bankruptcy 3561

Plan of reorganization that allows old equity to retain property "on account of" substantial, necessary, and fair new value contribution, does not give old equity property "on account of" prior interests as prohibited by Bankruptcy Code provision codifying absolute priority rule. Bankr. Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

16. Bankruptcy 3561

For old equity to retain its interest pursuant to new value exception to absolute priority rule, capital contribution must be: new; substantial; money or money's worth: necessary for successful reorganization: and reasonably equivalent to value or interest received. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii).

17. Bankruptcy 3561

Proposed capital contribution of limited partners of Chapter 11 debtor in approximate amount of $2.4 million, $770,000 of which would be contributed by sign management company licensed to sell advertisements on facade of debtor's building, and a proposed contribution at confirmation of $1,590,000, of which $240,000 was to be contributed by sign management company, was not proportionate to interests which principals and company would retain under debtor's plan of reorganization and failed to meet the requirements of the new value exception to the absolute priority rule, where it appeared only small portion of new value capital infusion would be allocated to satisfy creditors' claims upon confirmation but instead was to be used primarily to make repairs to building and preserve enhanced value of interest to be retained by contributing principals. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii).

18. Bankruptcy 3561

Absolute priority rule applied to proposed capital contribution of limited partners in Chapter 11 plan of reorganization even though debtor had no equity in property retained by contributing principals by virtue of bank's postconfirmation mortgage on property for its stipulated value; even where debts far exceeded current value of asset, debtor who retained his equity interest in enterprise retained property whether value was present or prospective, for dividends or only for purposes of control. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii).

19. Bankruptcy 3559

Chapter 11 plan of reorganization presented reasonable prospects of debtor's future financial stability so that plan as proposed was feasible under Bankruptcy Code; success of plan was based largely on potential income from projected new signage on facades of debtor's building and, although it was difficult to precisely predict future income from building signage generally plan proposed plausible strategy for leasing new signage on facades of building and evidence at trial revealed that building's earning power was likely to improve over life of plan. Bankr.Code, 11 U.S.C.A. § 1129(a)(11).

20. Bankruptcy 3559

Feasibility test for confirmation of Chapter 11 plan of reorganization requires court to determine whether plan is workable and has reasonable likelihood of success. Bankr.Code, 11 U.S.C.A. § 1129(a)(11).

21. Bankruptcy 3559

Factors proponent of Chapter 11 plan of reorganization must address and court should consider in making feasibility determination include: adequacy of debtor's capital structure; earning power of business; economic conditions; ability of management; probability of continuation of same management; and any other related matters which determine prospects of sufficiently successful operation to enable performance of provisions of plan. Bankr.Code, 11 U.S.C.A. § 1129(a)(11).

Shaw, Licitra, Parente, Esernio & Schwartz, P.C., Garden City, NY By J. Stanley Shaw, Craig A. Damast and Barbara L. Weisberg, for debtor.

LeBoeuf, Lamb, Leiby & MacRae, New York, NY By John S. Kinzey, John P. Campo, Ira A. Reid and Timothy W. Walsh, for Banque Nationale de Paris.

MEMORANDUM OF DECISION ON CONFIRMATION OF THE DEBTOR'S PLAN OF REORGANIZATION

CORNELIUS BLACKSHEAR,
Bankruptcy Judge.

INTRODUCTION

The matter before this Court is confirmation of the Plan of Reorganization (the "Plan"), filed by One Times Square Limited Partnership (the "Debtor") in the One Times Square Limited Partnership Chapter 11 Case. As is more fully explained below, Banque Arabe et Internationale d'Investissement[1] (the "Bank") has filed four primary objections to confirmation of the Plan.

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[1] On March 30, 1993, Banque Nationale de Paris, by assignment, became successor in interest to Banque Arabe et Internationale d'Investissement's

First, the Bank argues that the Plan improperly classifies claims for the sole purpose of manipulating the voting, to ensure at least one impaired class accepts the Plan. The Bank asserts that the separate classification of unsecured claims into Classes 5 and 6 is improper and violates sections 1122(a) and 1129(a)(1) of the Bankruptcy Code (the "Code").[2]

The Bank's second objection is that the Plan fails to provide the Bank with "fair and equitable" treatment with respect to its secured claim, because the Plan does not provide the Bank with a present value on its secured claim, equal to or greater than the $19,000,000 stipulated value. Thus, the Plan violates section 1129(b)(2)(A)(i)(II) of the Code.[3]

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interest in the note and mortgage on Debtor's building and real property located at One Times Square.

2 Section 1122 of the Code provides:

(a) except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience. Section 1129(a)(I) provides:

The court shall confirm a plan only if...The plan complies with the applicable provisions of this title.

3 Section 1129(b)(2) defines "fair and equitable" in relation to the treatment of claims in a chapter 11 reorganization plan. Pursuant to section 1129(b)(2)(A)(i)(II), a plan is fair and equitable: with respect to a class of secured claims. [if, *inter alia,*] the plan provides—

that each holder of a claim of such class receive on account of such claim deferred cash payments totalling at least the amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate s interest in such property.

The Bank's third objection is that the Plan violates the absolute priority rule, as codified in section 1129(b)(2)(B)(ii) of the Code[4] because it does not not provide the Bank with fair and equitable treatment with resppect to its unsecured claim. The Bank argues it would not be paid the full present value of its claim while the junior Class 8 claimants are permitted to retain their pre-petition interests. Lastly, the Bank maintains that the Plan is not feasible as required by section 1129(a)(11) of the Code.[5]

For the followi ng reasons this Court holds that the Debtor's Plan cannot be confirmed.[6]

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[4] The absolute priority rule, as codified in sections 1129(b)(2)(B)(i) and (ii), provides:

With respect to a class of unsecured claims—the plan provides that each holder of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

[5] Section 1129(a)(11) of the Code provides:

The Court shall confirm a plan only if... Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

[6] This court's subject matter jurisdiction over this matter arises under 28 U.S.C. §§ 1334(b) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.).

BACKGROUND

On October 17, 1991, the Bank began foreclosure proceedings against the Debtor in New York State Supreme Court. The Debtor's single asset is the building and real property located at One Times Square ("OTS"), New York City. OTS is encumbered by the Bank's mortgage and security interest in all rents, profits, proceeds and contractual rights arising out of OTS, as set forth in the Agreement of Spreader, Consolidation and Modification of Mortgage and the Amended and Consolidated Mortgage Note executed between the Bank and the Debtor on March 14, 1989.

On March 11, 1992, the Debtor filed its Chapter 11 petition. As of the petition date, the Debtor owed the Bank $30,045,311.18.

On April 28, 1992, the Debtor moved this Court, by separate motions, for authorization to reject certain executory contracts (the "signage agreements" or "contracts") between the Debtor and Spectacolor, Inc. ("Spectacolor"), and the Debtor and Van Wagner Communications, Inc. ("Van Wagner"). Spectacolor and Van Wagner are sign management companies, licensed to sell advertisements on the facades of OTS. The Debtor's rejection of the current Van Wagner and Spectacolor agreements would result in damage claims totalling $3,000,000.

On June 8, 1992, the Debtor and the Bank entered into a stipulation fixing the value of OTS. The parties agreed that for purposes of section 506(a) of the Bankruptcy Code (the "Code"), the value of OTS, as of the filing date, was $19,000,000. The Bank did not move before this Court for treatment of its entire claim as secured, pursuant to section 1111(b)(2) of the Code.[7] Therefore, the Bank has a secured claim of $19,000,000 and an unsecured deficiency claim of approximately $11,050,000.

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[7] Section 1111 (b)(2) of the Code provides:

On July 15, 1992, the Debtor filed its Disclosure Statement and Plan of Reorganization. The Disclosure Statement was approved by order of this Court dated September 30, 1992.

On July 17, 1992, the Debtor and the Bank entered a stipulation approved by this Court which, *inter alia*, modified the automatic stay only so far as to permit the Bank to continue foreclosure proceedings in New York State Supreme Court to judgment. The stipulation required, however, that if the Bank sought relief from the stay pursuant to section 362(d) of the Code in order to sell any property, it would have to return to the Bankruptcy Court. The Bank continued the foreclosure proceedings and on August 6, 1992, the New York State Supreme Court granted summary judgment of foreclosure in favor of the Bank against the Debtor and Spectacolor. On August 20, 1992, the New York State Supreme Court also granted summary judgment of foreclosure in favor of the Bank against the Debtor and Van Wagner. On January 8, 1993, the New York State Supreme Court granted a judgment of foreclosure and sale in favor of the Bank. The judgment was entered on April 7, 1993. The Bank now seeks relief from the automatic stay pursuant to section 362(d) in order to proceed with a foreclosure sale.

On November 9, 1992, the Debtor executed separate stipulations with Spectacolor and Van Wagner (the "November 9 Stipulations"). The parties agreed that the signage agreements between the Debtor and each party would be deemed rejected contingent upon, *inter alia*, this Court's approval and confirmation of the Debtor's Plan of Reorganization pursuant to section 1129(b) of the Code. The Van

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If such an election is made, then not withstanding section 506(a) of this title, such claim is a secured claim to the extent such claim is allowed.

Wagner stipulation, *inter alia*, obligated Van Wagner to contribute up to $720,000 to the Debtor, for the Debtor's use in funding the Plan.

Contemporaneously, the Debtor negotiated new signage agreements with Spectacolor and Van Wagner which, unlike the existing agreements between the parties, provide the Debtor with a greater percentage of the income generated from the signage. The November 9 Stipulations expressly conditioned approval of the new signage agreements upon a vote by Van Wagner and Spectacolor in favor of the Plan. The approval of the November Stipulations is pending before this Court.

The Plan contemplates eight classes of creditors. They are:

Class 1, which includes all administrative priority claims. The Debtor estimates these claims will total approximately $300,000 as of the effective date of the Plan;

Class 2, which includes priority claims other than administrative or tax claims (there are no claims in this class);

Class 3, which includes all priority tax claims (there are no claims in this class);

Class 4, which includes the Bank's allowed secured claim of $19,000,000;

Class 5, which includes the allowed unsecured claims of Spectacolor and Van Wagner, which arise from the Debtor's anticipated rejection of the existing executory contracts, totalling approximately $3,000,000;

Class 6, which includes general unsecured claims, aggregating approximately $11,250,000. This class consists of the Bank's deficiency claim of approximately $11,050,000 and the claims of the small trade vendors which aggregate approximately $202,860;

Class 7, which includes the allowed claims of certain principals of the Debtor for commissions from the sale of new signage on OTS; and

Class 8, which includes the interests of the limited partners of OTS.

Under the proposed Plan, the claims in Classes 1, 2, and 3 will be paid in full pursuant to section 1129(a)(9)(A) of the Code,[8] on or before the effective date of the Plan and are, therefore, unimpaired.

Under the proposed Plan, the Debtor will pay the Bank's Class 4 allowed, secured claim of $19,000,000 with deferred cash payments over a ten (10) year period, based upon a thirty (30) year amortization rate, with a balloon payment at the end of the tenth year. The Debtor proposes to make monthly payments of principal and interest at either a fixed LIBOR[9] rate plus 4%, or a floating LIBOR rate plus 1.75%, equalling, approximately $1,517,000 annually or $15,169,000 over the life of the plan. Further, the Debtor anticipates making additional principal payments of $3,870,000 during the life of the Plan, and that the final balloon payment would equal, approximately, $11,841,000. Thus, the Plan proposes that the payments to the Bank will total, approximately, $30,880,000.

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8 Section 1129(a)(9)(A) provides: The court shall confirm a plan... Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, [if] the plan provides that—with respect to a claim of the kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim.

9 The London Interbank Offered Rate ("LIBOR") is the rate paid in London on three-month dollar deposits from other banks, used as a basic rate in international lending. New York Times, 7/6/93, section d; p. 7; Col. 2, Table.

Van Wagner and Spectacolor, the Class 5 claimants, are to be paid 2.50% of the amounts of their claims equalling $75,000, without interest, in 11 equal installments. The first payment is to be made from a cash contribution, by the Debtor to the estate, on the effective date of the Plan. The ten (10) subsequent installments are to be made on a yearly basis.

The Plan proposes to pay the Class 6 claimants 7.50% of their allowed claims, without interest, over a five (5) year period in equal installments. The first payment is to be made from a cash contribution, by the Debtor to the estate, on the effective date of the Plan. The five (5) subsequent payments are to be made on a yearly basis. Therefore, the Bank will be paid $828,398.18 on its deficiency claim, and the small trade vendors will receive $15,220.50.

The Class 7 claims will not, by consent of their holders, be paid under the Plan.

The Class 8 claimants, the Debtor's limited partners, will retain their interests in the Debtor, in consideration for their cash contributions to the Plan. Their contributions include $1,590,000 in cash on or before the effective date, $240,000 of which is to be received by the Debtor from Van Wagner, pursuant to the Van Wagner stipulation. An additional $807,000 will be contributed by the limited partners, $480,000 of which will be received by the Debtor from Van Wagner, if needed, pursuant to the Van Wagner stipulation, on the first and second anniversaries of the effective date of the Plan. The total, potential contribution by the limited partners would equal approximately $2,397,000.

The impaired classes entitled to vote on the Plan are Classes 4, 5, and 6. Classes 4 and 6 voted to reject the Plan, pursuant to Bankruptcy Rule 3018(d).[10] Class 5 voted in favor of the Plan.

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[10] Rule 3018(d) of the Federal Rules of Bankruptcy Procedure provides:

Therefore, the Debtor is seeking confirmation of the Plan pursuant to section 1129(b) of the Code or what is referred to in the vernacular as "cram down"[11]

DISCUSSION

There is a philosophy of strict statutory construction which indicates that judges should give deference to the plain meaning of a statute. In other words, the judge should not engage in judicial legislation. This court adheres to that philosophy and will continue to do so in the future. However, this does not mean that a judge should become an automaton who can be easily replaced at a reduced cost by installing a computer on the bench. If Congress had intended such a result, they would not have enacted 11 U.S.C. 105.[12] Nor would they have inserted language throughout the Code such as "including" or "as the court for cause may order."

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.

[11] Section 1129(b)(1) of the Code provides:

> ... If all of the requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

[12] § 105(a) of the Bankruptcy Code provides that:

> the court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[1] Congress enacted 11 U.S.C. 105 because they knew that they could not envision all matters dealing with a bankruptcy court or the creativity of attorneys. However, this Court is of the opinion that 11 U.S.C. 105 should be used sparingly and then only to supplement the Bankruptcy Code, not supplant the Code.

1) CLASSIFICATION OF CLAIMS

[2] As a preliminary matter this Court determines that the November 9, 1993 stipulations between the Debtor and Spectacolor and the Debtor and Van Wagner are hereby approved.[13] By approval of the foregoing stipulations, the former signage agreements are rejected, thereby creating the class of unsecured claims. The Plan proposes to classify the Van Wagner and Spectacolor claims together, separate from the other unsecured claims, and to pay 2.50% of the amount of these claims without interest, over the life of the Plan. The Debtor has, in effect, created an unsecured, impaired, voting class[14] in order to confirm the Plan.

Bearing the preceding in mind, we will turn to the "unique" issues concerning the classification of claims, within this Chapter 11 Plan of Reorganization. Section 1129(a)(1) provides that a Chapter 11 Plan of Reorganization will be confirmed only if the plan complies with all of the applicable sections of the Code. Section 1123(a)(1) provides that the plan must "designate, subject to Section 1122 of

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"The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of jurisdiction." 2 *Collier on Bankruptcy*. ¶ 105.01 (15th ed. 1990).

[13] For purposes of these matters, the November 9, 1992, Stipulations referred to herein will be deemed signed as of the date of this opinion.

[14] It should be noted that unless the Debtor rejects the current signage contracts, the interests of Van Wagner and Spectacolor will be expunged due to the foreclosure judgments against them. *See, supra* at 698, 699.

this title, classes of claims other than claims of a kind specified in sections 507(a)(1). 507(a)(2) or 507(a)(7) of this title, and classes of interest."

In most single-asset real estate reorganizations the classification dispute concerns the classification of a creditor's deficiency claim apart from the other general unsecured claims. *See e.g., In re 104 Limited,* 160 B.R. 202 (Bankr.S.D.Fla. 1993); *In re D & W Realty Corporation,* 156 B.R. 140 (Bankr.S.D.N.Y. 1993); *In re 500 Fifth Ave. Associates,* 148 B.R. 1010 (Bankr.S.D.N.Y. 1993), *aff d.* No. Civ. 844, 1993 WL 316183 (May 21, 1993) (Freeh, U.S.D.J.) (*In re 500 Fifth Ave.*). Here, the Plan classifies the Bank's deficiency claim with most of the other unsecured claims. The issue, therefore, is whether the classification of Van Wagner and Spectacolor claims separately from the other unsecured claims is permissible.

The Bank claims that the separate classification of most unsecured claims, including the Bank's deficiency claim, into Class 6, and the unsecured signage rejection claims into Class 5, is improper and violates section 1122(a) the Code. The classification scheme, so argues the Bank, serves only to manipulate voting on the Plan to ensure that at least one class votes in favor of the Plan as required by section 1129(a)(10). Thus confirmation of the Plan would allow the Debtor to cram down the Plan over the Bank's dissenting vote.

[3, 4] Generally, unsecured creditors are claimants of equal rank, entitled to share, *pro rata,* in the values remaining after the payment of secured and priority claims. *In re 266 Washington Associates,* 141 B.R. 275, 282 (Bankr.E.D.N.Y., 1992) *aff d, 266 Washington Associates v. Citibank,* 147 B.R. 827 (E.D.N.Y.,1992). Unsecured creditors will ordinarily comprise one class, whether trade, tort, publicly held debt or a deficiency of a secured creditor. *In re Pine Lake Village Apartment Co.,* 19 B.R. 819, 830 (Bankr.S.D.N.Y.,1982) *(Quoting, 3 Norton Bankr.L. & Prac.,* § 60.05), *reh'g denied,* 21 B.R. 478 (Bankr.S.D.N.Y.1982).

[5] A broad reading of section 1122(a) does not, however, require all similarly situated claims to be classified together. The statute on its face merely requires that claims classified together be "substantially similar." 11 U.S.C. § 1122(a). Thus, a debtor is allowed some discretion when classifying unsecured claims. *In re Bryson Properties, XVIII*, 961 F.2d 496, 502 (4th Cir.1992), *cert. denied*, —U.S.—. 113 S.Ct. 191, 121 L.Ed.2d 134 (1992) (*"In re Bryson"*); *In re Greystone III Joint Venture*, 995 F.2d 1274, 1278 (5th Cir.1991) (*"In re Greystone"*); *In re 500 Fifth Ave.*,148 B.R. 1018; *cf., In re Mastercraft Record Plating, Inc.*, 32 B.R. 106, 108 (Bankr.S.D.N.Y.1983), *rev'd on other grounds*, 39 B.R. 654 (S.D.N.Y.1984).

[6] Bankruptcy courts and courts of appeal that have reached the issue, generally hold to one maxim: "Thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan... Classification of 'substantially similar' claims in different classes... may only be undertaken for reasons independent of the debtor's motivation to secure the vote of an impaired assenting class of claims." *In re Greystone*, 995 F.2d at 1279; *in re U.S. Truck Co.*, 800 F.2d 581 (6th Cir.1986); *In re 500 Fifht Ave.*, 148 B.R. at 1019 (Bankr. S.D.N.Y.1993).The separate classification of substantially similar unsecured claims, therefore, will be allowed only when there is a reasonable basis for doing so or, in other words, when the decision to separately classify does not offend one's sensibility of due process and fair play. *John Hancock Mutual Life Insurance Company v. Route 37 Business Park Associates*, 987 F.2d 154, 158 (3rd Cir.1993); *In re Jersey City Medical Center*, 817 F.2d 1055, 1060 (3d Cir.1987); *Teamsters Nat'l. Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir.1986); *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 757 (Bankr.S.D.N.Y.1992).

The Debtor contends that the separate classification of the Van Wagner and Spectacolor claims is permissible due to the uniqueness of the claims, interests, and objectives of Van Wagner and Spectacolor, as compared to ordinary general unsecured creditors. The Debtor claims that the classifications were made independent of any motivation to gerrymander an impaired assenting class.

[7, 8] The Debtor errs, however, in its interpretation of when an unsecured claim may permissibly occupy a class separate from other unsecured claims. Generally, claims resulting from the rejection of executory contracts are legally similar to general unsecured claims. *See, 5 Collier on Bankruptcy*, ¶ 1122.03[4], at 1122-11 (Lawrence P. King et al., eds., 15th ed. 1993). It therefore follows that claims can be classified separately only "for 'reasons independent of the debtor's motivation to secure the vote of an impaired assenting class of claims'" *In re Lumber Exchange Bldg. Ltd. Partnership*, 968 F.2d 617, 649 (8th Cir.1992) (quoting *In re Greystone*, 948 F.2d 134, 139 (5th Cir.1991). However, the uniqueness of the underlying legal nature of a creditor's claim as it relates to the assets of a debtor is an independent reason for which a court may permit separate classification. *In re AOV Industries, Inc.*, 792 F.2d 1140, 1150-1151 (D.C.Cir.1986).

For instance, *In re U.S. Truck Co.*, the Sixth Circuit Court of Appeals affirmed the District Court's finding that the separate classification scheme proposed by the debtor, U.S. Truck Co., an interstate trucking firm, was proper. Specifically, the Court of Appeals held that the claim of the Teamsters National Freight Industry Negotiating Committee (the "Teamsters Committee") was unique because the union has a "noncreditor interest"—it might vote based on the plan's effect on "its members in the ongoing employment relationship" rather than on the plan's treatment of it as a creditor. *In re U.S. Truck Co.*, 800 F.2d 581, 587 (6th Cir.1986). In addition, the Sixth Circuit affirmed the District Court's findings that the Debtor's separate classification scheme was proper because

(1) the employees represented by the Teamsters Committee have a unique continued interest in the ongoing business of the debtor (2) the mechanics of the Teamsters Committee's claim differ substantially from those of the other class which also contained claims arising from the rejection of executory contracts; and (3) the Teamsters Committee's claim is likely to become part of the agenda of future collective bargaining sessions between the union and the reorganized company. *Id.* at 584. Finally, the Court of Appeals found that permitting separate classification of the Committee's claim did not automatically result in adoption of the Plan. *Id.* at 587.

Unlike the Committee in *In re U.S. Truck Co.*, the Debtor has provided no probative basis for separately classifying the Van Wagner and Spectacolor claims other than to create an impaired class for voting purposes. Here, the claims of Van Wagner and Spectacolor result from the proposed rejection of the current signage agreements and are therefore properly characterized as general unsecured creditors. However, neither the nature of this creditor's business, the nature of the debtor's assets or the mechanics of the creditor's claim sufficiently justifies separate classification. *In re UNR Industries, Inc.*, 143 B.R. 506 (Bankr.N.D.Ill.1992); *In re 266 Washington Associates*, 141 B.R. at 286. Additionally, the interests are neither unique nor greater than any other unsecured creditor in Class 6. The fact that Van Wagner and Spectacolor are willing to enter into another signage contract with the Debtor if the Plan were to be confirmed further belies the uniqueness of their unsecured claim.

At trial, during cross-examination by the Bank's counsel, Arthur Nevid, property manager for the Debtor, admitted that the Debtor separately classified claims in order to gerrymander the vote but provided no reasonable basis for having done so:

> Question: You participated in the formulation of the Debtor's plan, right?
>
> Mr. Nevid: Correct.

Question: You are familiar with the plan?

Mr. Nevid: Yes.

Question: Am I correct that the plan contemplates separate classification of the signage rejection claims, is that correct?

Mr. Nevid: Yes.

Question: And the other unsecureds?

Mr. Nevid: Yes.

Question: Can you tell us why that's the case?

Mr. Nevid: We were advised by counsel that we were able to reject those contracts, rejecting those contracts would create them as creditors and that would enhance—that would enable us to have a plan that would be confirmable.

Hrg.Tr. at 394 l. 1.20—396 l. 1.16.

Neither the testimony at trial, nor the documents submitted, convince this Court that the rejection of the Van Wagner and Spectacolor contracts and their separate classification into Class 5, is necessary to the Debtor. Rather than reject the current signage agreements the Debtor could have renegotiated the current contracts and included the new provisions in the modified contracts. The Debtor could then have assumed the modified contracts. This Court finds that the Debtor's assumption of the modified contracts would likely achieve the same economic goals as that which underlies the Debtor's arbitrary classification scheme, i.e., rejection of the current signage agreements, creation of Class 5, and the execution of the new agreements proposed in the Van Wagner and Spectacolor stipulations.

Mr. Nevid, also at trial, admitted that the Debtor made no attempt to renegotiate contract terms with Van Wagner and Spectacolor:

The Court: Since you gave it to the signage people... on a take it or leave it basis, could you not have reached this agreement without a rejection of the executory contracts?

Mr. Nevid: I was advised by—

The Court: I know what you were advised you had the legal right to do, and I think everybody is in accord with that; but you also had the right, ... to agree to a modification of your agreement without a rejection of the existing contract.

Mr. Nevid: Well, Your Honor, two things. Number one, we were advised... that we can reject...

The Court: I have no problem with that.

Mr. Nevid: Okay, but from a practical standpoint, as a layman not as an attorney, certainly not as a bankruptcy attorney, it didn't make sense to me. Renegotiation, per se, didn't seem like a possibility because we would be renegotiating in vain because we would end up—they would be foreclosed upon, we would be foreclosed upon, it wouldn't serve any purpose. We didn't have many alternatives, we had to reject—

The Court: In order to put them in a separate class?

Mr. Nevid: (Continuing)—to make the plan feasible.

* * *

The Court: My question is, could you have reached that agreement to modify the original agreement without rejecting the previous agreement?

Mr. Nevid: It was never considered. I don't know if we could have.

The Court: Why wasn't it considered?

Mr. Nevid: It was explained to me by counsel that the contracts, they were rejectable and they had to be rejected, period. Those are my marching orders.

Hrg. Tr. at 407 l. 1.4—410 l. 1.8.

Since creation of Class 5 serves no legitimate purpose in the financial restructuring of the Debtor, this Court finds that the purpose of creating Class 5 was solely to create a separate, non-insider, impaired class guaranteed to accept the Plan. The lease rejection claimants and all other unsecured claimants have the same legal relationship with the Debtor, that of general unsecured creditors. The legal nature of the rejection claims are not unique and separate classification is not justified by any sound business reason. Therefore, this Court finds that the Debtor's Plan of Reorganization violates sections 1122(a) and 1129(a)(1) of the Code.

(2) CRAM DOWN AND THE TREATMENT OF THE BANK'S SECURED CLAIM UNDER THE PLAN

[9] Assuming, arguendo, this Court were to find the classification scheme proposed in the Plan permissible, then it would be necessary for this Court to address the other objections raised by the Bank. The Bank's second objection is that the Plan fails to provide the Bank with "fair and equitable" treatment with respect to its secured claim, because the Plan does not provide the Bank with a present value on its secured claim, equal to or greater than the $19,000,000 stipulated value. Thus, the Bank argues that the Plan violates section 1129(b)(2)(A)(i)(II) of the Code.

Confirmation of a plan of reorganization requires that the plan be accepted by all impaired classes of claims. See 11 U.S.C. § 1129(a)(8) (1991). When an impaired class rejects the plan, the court may nevertheless confirm over the objection of impaired classes

provided three criteria are met: (1) the plan does not discriminate unfairly, (2) the plan is fair and equitable with respect to each impaired class of claims and (3) the thirteen conditions precedent to confirmation contained in section 1129(a) are satisfied. 11 U.S.C. § 1129(b)(1) (1991).

The Bank has voted both its Class 4 and Class 6 impaired claims to reject the Plan. Therefore the Plan cannot be confirmed unless the Debtor can demonstrate that the Plan does not violate the cram down provisions of section 1129(b).

[10, 11] To satisfy the "fair and equitable" requirement with respect to a secured claim, the claimholder: (1) retains its lien; and (2) receives "deferred cash payments totaling at least the allowed amount of such claim of a value as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. § 1129(b)(2)(A)(i)(I)—(II) (1991); *In re Bryson*, 961 F.2d at 500. The facts of this case do not require an analysis of the first issue. Applying the second requirement, the secured creditor must retain its liens on the property and the deferred payments must be discounted at an interest rate which is sufficient to compensate the creditor for the time value of money. *In re Bryson*, 961 F.2d at 500.

[12] Although the Code does not expressly provide how interest rates should be computed, this Court agrees with the courts that follow the rule articulated in *Collier*. Accordingly, we hold that the proper interest rate is the current market rate for loans which are similar in term, quality of security and risk of repayment or financial condition of the borrower. *5 Collier on Bankruptcy* ¶ 1129.03(f)(i), *see, In re Bryson*, 961 F.2d at 500; *In re Monnier Bros.*, 755 F.2d 1336, 1339 (8th Cir. 1985).

The Bank argues, and this Court agrees, that the interest rates contemplated by the Plan do not reasonably reflect the potential risks to be borne by the Bank. Based upon the evidence adduced at trial,

the Debtor cannot obtain a loan for a 100% loan-to-value ratio under the terms it is proposing under the Plan. Simply put, a comparable loan is not available in the market place. Because the interest rates the Debtor proposes do not approach the range of prevailing market rates for loans of comparable risk and duration, the payments to the Bank will not yield a present value of $19 million. Thus, the Debtor has failed to propose a Plan which is "fair and equitable" to the Bank and, therefore, the Debtor's Plan violates section 1129(b)(2)(A)(i)(II) of the Code.

3) Section 1129(b)(2)(B)(ii)—THE ABSOLUTE PRIORITY RULE AND THE "NEW VALUE" EXCEPTION

[13] The Bank argues that the Plan violates the absolute priority rule because the holders of Class 8 interests, the Debtor's limited partners, will retain their interests without dilution of their pre-petition equity shares, while the Class 6 unsecured creditors will be paid only 7½% of their allowed secured claims over five (5) years, without interest.

The Bank further contends that the "new value" exception to the absolute priority rule does not exist and that even if it did exist the interests retained by interest holders are limited to the extent of the "new value" actually proved to the reorganized debtor. If the new value exception does exist, so argues the Bank, the interest retained is limited by the fair market value of the equity in the reorganized Debtor, as measured by the amount that creditors or third parties are willing to pay to obtain an equity interest in the reorganized Debtor and subject to higher and better offers.

The new value exception was first announced in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 60 S.Ct. 1, 84 L.Ed. 110 (1939) (*Los Angeles Lumber*). In *Los Angeles Lumber*, the Supreme Court, citing *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482, 33 S.Ct. 554, 57 L.Ed. 931 (1913), and *Kansas City Terminal Railway Co. v. Central Union Trust Co.*, 271 U.S. 445, 46

S.Ct. 549, 70 L.Ed. 1028 (1926), said that where the need for new money essential to the success of the reorganized debtor arises and the old equity holders make a fresh contribution and receive in return a participation "reasonably equivalent to their contribution" no objection can be made. 30 U.S. at 121, 60 S.Ct. at 10.

[14] Although neither the Supreme Court, nor the Second Circuit, has specifically ruled upon the issue of the continued existence of the new value exception, the Supreme Court has referred to it. In *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (*Ahlers*), the Court indicated that there would be no expansion of the new value exception beyond that recognized in the case law at the time the Code was enacted. *Id.*, 486 U.S. at 205, 108 S.Ct. at 968. In footnote 3, however, the Court specifically stated that it was not ruling on the continued existence of the new value exception.[15] Thus, there has been disagreement as to whether the new value exception has survived the enactment of the Code.

Recently, the Ninth Circuit in *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co.*, 2 F.3d 899 (9th Cir.1993) (*In re Bonner Mall Partnership*) held that "the new value exception remains a vital principle of bankruptcy law." In *In re Bonner Mall Partnership*, the debtor, owner of a shopping mall in foreclosure, proposed a Chapter 11 plan of reorganization that relied on the new value exception. U.S. Bancorp Mortgage Co. objected to the plan, arguing, *inter alia*, that the new value exception had not survived the enactment of the Code.

[15] The Ninth Circuit's opinion on the continued viability of the new value exception hinges on its interpretation of the absolute priority rule. The absolute priority rule was a judge-made doctrine

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15 "[O]ur decision today should not be taken as any comment on the continuing vitality of the *Los Angeles Lumber* [new value] exception..." *Ahlers*, 485 U.S. at 203, 108 S.Ct. at 969, n. 3.

under the Bankruptcy Act (the "Act") and is now codified pursuant to section 1129(b)(2)(B)(i) and (ii) in the Code. Pursuant to section 1129(b)(2)(B)(ii), "The holder of any claim or interest that is junior to the claims of [a senior] class will not receive or retain under the plan on account of such junior claim or interest any property." (emphasis added) 11 U.S.C. § 1129(b)(2)(B)(ii). "Had Congress intended that old equity never receive any property under a reorganization plan where senior claim classes are not paid in full, it could simply have omitted the 'on account of' language from section 1129(b)(2)(B)(ii)." *In re Bonner Mall Partnership*, 2 F.3d at 909. A plan of reorganization that allows old equity to retain property "on account of" a substantial, necessary, and fair new value contribution, does not give old equity property "on account of" prior interests. *In re U.S. Truck*, 800 F.2d at 581.

Section 1129(b)(2)(B)(ii) prohibits old equity holders from retaining property on account of their claims or interests if classes of creditors senior to them have not been paid pursuant to section 1129(b)(2)(B)(i). However, Section 1129(b)(2)(B)(ii) does not say that old equity holders may never retain property.

In *Dewsnup v. Timm*, —U.S.—, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), the Supreme Court's most recent decision concerning interpretation of the Code in light of the Act, the Court held that when amending the bankruptcy laws "Congress did not write 'on a clean slate.'" Therefore, most bankruptcy analysts look to pre-Code practice under the Act for the most logical referral of the exception to section 1129(b)(2)(B)(ii). Since the new value exception was a recognized exception to the absolute priority rule under the Act, and section 1129(b)(2)(B)(ii) does not completely forbid old equity from retaining property, this Court finds that the new value exception has, indeed, survived enactment of the Code.

[16] In consideration of above findings, it therefore follows that the Debtor's new value contribution must be evaluated in light of the criteria announced in *Los Angeles Lumber*. For old equity to

retain its interests pursuant to the exception, the capital contribution must be (1) new, (2) substantial, (3) money or money's worth, (4) necessary for a successful reorganization and (5) reasonably equivalent to the value or interest received. (Citations omitted.) *In re Bonner Mall Partnership*, 2 F.3d at 908.

[17] The instant case is analogous to *In re Miami Center Associates, Ltd.*, a recently reported single asset real estate Chapter 11 case. *In re Miami Center Associates, Ltd.*, 144 B.R. 937 (Bankr.S.D.Fla.1992). *In re Miami Center Associates, Ltd.*, concerns circumstances in which the debtor's partners were to contribute new value in the amount of $2 million dollars upon confirmation of the Plan. *Id.* at 942. In return, the partners would retain all interest in the debtor's property with a present value of $18,550,000. The secured creditor was owed approximately $38 million dollars in connection with first and second nonrecourse mortgages that it held on both the Debtors real and personal property. Under the Plan, unsecured creditors were not to be paid in full. The court held that it was the partners who primarily stood to gain from the capital cash infusion while the secured creditor ran the ultimate risk of the project's failure with no upside potential. The court, without ruling on the continued viability of the new value exception, held that the treatment of the secured creditor was not fair and equitable because the size of the new value contribution was not reasonably equivalent to the equity retained. *Id.* Thus, the plan violated the absolute priority rule.

Similarly, in the instant case the Debtor's principals are proposing a new value capital infusion in the approximate amount of $2.4 million, $770,000 of which will be contributed by Van Wagner. At confirmation, the proposed contribution is $1,590,000, of which $240,000 is to be contributed by Van Wagner.

It appears that only small portion of the "new value" capital infusion is allocated to satisfy creditors' claims upon confirmation. The new value is to be used primarily to make repairs to OTS and

thereby preserve and enhance the value of the interest to be retained by the contributing principals.[16] Thus, the Plan reserves the upside potential for the Debtor while forcing the Bank to bear all the risk.

This Court finds that the proposed capital contribution of the limited partners is not proportionate to the interests which they will retain under the Debtor's Plan of Reorganization. We therefore conclude that the capital infusion fails to meet the requirements of the new value exception.

The Bank maintains that in order to promote the best interest of the creditors, the equity stake in the Debtor should be subject to higher and better offers including offers from the public or other creditors. In that way, creditors can be assured that they are receiving the maximum capital infusion available.

[18] The debtor responds by pointing out that the Bank possesses a total claim against the Debtor of approximately $30 million. OTS has a stipulated value of $19 million. Accordingly, the Plan provides that the Bank will retain its lien on OTS to the extent of $19 million. Thus, the Debtor has no equity in OTS by virtue of the Bank's post-confirmation mortgage on OTS for $19 million.

The debtor's argument is a variation of the "no value" theory rejected by the Supreme Court in *Ahlers*. In *Ahlers*, the debtor argued that the absolute priority rule does not apply where the property which the junior interest holder wishes to retain has no value to the senior unsecured creditors. *Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). The debtor maintained that "the creditors are deprived of nothing if such a so-called 'interest' continues in the possession of the reorganized debtor." *Ahlers*, 485 U.S. at 207, 108 S.Ct. at 969. "Even where debts far exceed the current value of assets, a debtor who retains his equity interest in the enterprise

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[16] *Debtor's Plan of Reorganization* at 15.

retains 'property'... Whether the value is 'present or prospective for dividends or only for purposes of control' a retained equity interest is a property interest to 'which the creditors [are] entitled... before the stockholders [can] retain it for any purpose whatever.'" *Ahlers*, 485 U.S. at 208, 108 S.Ct. at 969, *citing*, *Northern Pacific R. Co. v. Boyd*, 228 U.S. at 508, 33 S.Ct. at 561.

In the instant case, the proposed new infusion of capital is not reasonably equivalent to the interests being received by the limited partners. Hence, the requirements for the new value exception to the absolute priority rule are not met. Therefore, the Plan violates section 1129(b)(2)(B)(ii) of the Code.

4) FEASIBILITY OF THE DEBTOR'S PLAN

[19] Section 1129(a)(11) of the Code requires that a plan be feasible in order for it to be confirmable, such that:

> confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. 1129(a)(11).

Collier articulates a summary of that feasibility requirement:

> Basically, feasibility involves the question of emergence of the reorganized debtor in a solvent condition and with reasonable prospects of financial stability and success. It is not necessary that the success be guaranteed, but only that the plan present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success.

5 Collier on Bankruptcy (15th ed. 1992) ¶ 1129.02[11], at 1129-54.

[20] The feasibility test requires the court to determine whether a plan is workable and has a reasonable likelihood of success. *In re Drexel Burnham Lambert Group, Inc., et al.*, 138 B.R. 723 (Bankr.S.D.N.Y.1992). The purpose of the feasibility test has been described as protection against visionary or speculative plans. *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir.1985) quoting, *5 Collier on Bankruptcy* ¶ 1129.02[11] at 1129-34 (15th ed. 1994); *accord, Drexel Burnham*, 138 B.R. at 762.

[21] Factors a plan's proponent must address and that a court should consider in making a feasibility determination include: (1) the adequacy of the debtor's capital structure; (2) the earning power of the business; (3) the economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; (6) any other related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. *In re Landmark Plaza Park, Ltd.*, 7 B.R. 653, 659 (Bankr.D.N.J.1980); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 151 (Bankr.S.D.N.Y.1984).

Based on the testimony of Robert Von Ancken ("Von Ancken"), President of James Felt Appraisal and Consulting Services and the supporting documents presented, this Court rejects the Bank's argument that the projections of earning power for OTS are overly optimistic without a further change in the current management. We further find that, absent the other statutory infirmities which this Court has already found bar the confirmation of this Plan, were the Plan to be confirmed, a change in management would not be necessary.

The success of the Plan is based largely on the potential income from the projected new signage on the south, east and west facades of OTS. While it is difficult to precisely predict the future income

from the building's signage generally, the Plan, nevertheless, proposes a plausible strategy for leasing new signage on the facades of OTS. In addition, at trial, Von Ancken made assumptions which revealed that the building's earning power is likely to improve over the life of the Plan. Because, this Court is persuaded that the Plan presents reasonable prospects of the Debtor's future financial stability we find that the Plan as proposed is feasible and comports with section 1129(a)(11) of the Code.

Conclusion

For the preceding reasons, this Court finds that the Debtor's Plan of Reorganization is not in compliance with the various sections of the Bankruptcy Code discussed above.

Therefore, this Court holds that the Plan proposed by the OTS Limited Partnership cannot be confirmed. Additionally, the Bank's motion for relief from the automatic stay pursuant to section 362(d) of the Code is granted. Accordingly, counsel for the Bank should settle an order on five (5) day's notice consistent with this opinion.

APPENDIX G

United States Bankruptcy Court

SOUTHERN DISTRICT OF NEW YORK

In re:

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

Chapter 11

Case No. 92 B 41471 (CB)

DEBTOR'S PROPOSED PLAN OF REORGANIZATION

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP, the above-captioned debtor (the "Debtor"), proposes the following plan of reorganization (the "Plan") pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Section 1121(a).

ARTICLE I

DEFINITIONS

For purposes of this Plan, the following terms shall have the respective meanings as hereinafter set forth (such meanings to be equally applicable to the singular and plural forms of the terms defined, unless the context otherwise requires). Capitalized terms used in this Plan shall at all times refer to the terms as defined in this Article I.

1.01. "Administrative Claim" means a claim for any cost or expense of administration of the Chapter 11 case allowed under Section 503(b) and 507(a)(1) of the Bankruptcy Code, *including*, without limitation,

(i) any actual and necessary costs and expenses of preserving the Debtor's estate and of operating the Debtor's business (other than such claims or portions thereof which, by their express terms, were not due or payable by the Effective Date);

(ii) all allowances of compensation for legal or other professional services or reimbursement of costs and to the extent allowed by the Court under Sections 330, 331 or 503 of the Bankruptcy Code or otherwise allowed by the Court; and

(iii) all fees and charges issued against the Debtor's estate pursuant to section 1930 of Title 28, United States Code.

1.02. "Allowed Administrative Claim" means all or that portion of any Administrative Claim which is an Allowed Claim.

1.03. "Allowed Claim" means a claim which (a) has been allowed by a Final Order; or (b) has been scheduled by the Debtor and is not scheduled as disputed, contingent or unliquidated, and as to which no objection to the allowance thereof has been interposed within the period of limitation fixed by the Bankruptcy Code, the Bankruptcy Rules or by Court order. "Allowed Claim" shall not include interest on the amount of the Claim except with respect to an Allowed Secured Claim as permitted by Section 506(b) of the Bankruptcy Code.

1.04. "Allowed Interest" means an Interest as to which no objection to the allowance thereof has been interposed within the applicable period of limitation fixed by the Bankruptcy Code, the Bankruptcy Rules or by Court order.

1.05. "Allowed Priority Claim" means that portion of an Allowed Claim which is entitled to priority status pursuant to Sections 507(a)(3) and 507(a)(4) of the Bankruptcy Code.

1.06. "Allowed Priority Tax Claim" means that portion of an Allowed Claim which is entitled to priority status pursuant to Section 507(a)(7) of the Bankruptcy Code.

1.07. "Allowed Unsecured Claim" means any Allowed Claim that is not an Allowed Administrative Claim, Allowed Priority Claim, Allowed Priority Tax Claim, or an Allowed Deficiency Claim.

1.08. "BAII Allowed Claim" means the Allowed Claim of Banque Arabe et Internationale D'Investissement ("BAII").

1.08.1 "BAII Allowed Secured Claim" means that portion of BAII's Allowed Claim that is secured by the value fixed by the Stipulation.

1.09. "Bankruptcy Code" means Title 11 of the United States Code, as the same may hereafter be amended.

1.10. "Bankruptcy Rules" means the Rules of Bankruptcy Procedure which govern procedure in cases under the Bankruptcy Code.

1.11. "Business Day" means any day other than a Saturday, Sunday or legal holiday as such term is defined in Bankruptcy Rule 9006(a).

1.12. Capital Improvement Plan means the Debtor's plan for improving and upgrading the property, in which the Debtor projects to spend approximately sixty (60%) percent of a total ten (10) year capital expenditure projection of approximately $5,565,000 during the first three (3) years.

1.13. "Chapter 11" means Chapter 11 of the Bankruptcy Code.

1.14. "Chapter 11 Case" means *In re One Times Square Associates Limited Partnership*, Case No. 92 B 41471 (CB), currently pending before the Court.

1.15. "Claim" means a claim against the Debtor as defined in Section 101(4) of the Bankruptcy Code; to wit: the (a) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.16. "Claimant" means the holder of a Claim.

1.17. "Confirmation" means entry of an order by the Court approving the Plan in accordance with Chapter 11.

1.18. "Confirmation Date" means the date upon which the Court enters an order confirming the Plan in accordance with Chapter 11.

1.19. "Confirmation Order means the Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11.

1.20. "Court" means the United States Bankruptcy Court for the Southern District of New York, or such other court as may have jurisdiction over the Debtor's Chapter 11 case.

1.21. "Debtor" means One Times Square Associates Limited Partnership, which filed a voluntary petition for reorganization on March 11, 1992.

1.22. "Deficiency Claim" means that portion of the Allowed BAII Claim which is not secured by the value of the Property.

1.23. "Disallowed Claim" means any claim or portion thereof that has been disallowed by a Final Order of the Court.

1.24. "Disputed Claim" means (a) any claim or portion of a claim (other that an Allowed Claim) which is scheduled by the Debtor as disputed, contingent or unliquidated, or (b) a claim which has been filed pursuant to Section 501(a) of the Bankruptcy Code as unliquidated or contingent, or (c) a claim which has been filed pursuant to Section 501(a) of the Bankruptcy Code and as to which an objection to the allowance thereof has been interposed within the time limitation fixed by the Bankruptcy Code, by an order of the Court, or by this Plan, which objection has not been determined, in whole or in part, by a Final Order.

1.25. Effective Date means the first Business Day which is the date ten (10) days after the Confirmation Order becomes a Final Order.

1.26. "Filing Date" means March 11, 1992.

1.27. "Final Order" means an order or judgment as to which order or judgment (or any revision, modification or amendment thereof) (a) the time to appeal or seek review, rehearing, reargument or certiorari has expired and as to which no appeal or petition for review, rehearing, reargument or certiorari proceeding is pending, or (b) an order or judgment which has been

appealed, has been affirmed on appeal and as to which appeal the time for further appeal has expired.

1.28. "Interest" means an equity holder of the Debtor.

1.29. "Plan" means this Plan of Reorganization as modified or amended from time to time as and to the extent permitted herein or by the Bankruptcy Code.

1.30. "Property" means the fee and commercial office building thereon known as One Times Square, New York, New York 10036.

1.31. "Spectacolor Contract" means that certain license agreement dated April 26, 1982 between TSNY Realty Corp. and Spectacolor Inc. wherein TSNY Realty Corp. licensed to Spectacolor Inc. right to maintain an electronic advertising display panel on a certain portion of space on the exterior facade of the Property commencing May 1, 1982.

1.32. "Spectacolor Signage License Allowed Claim" means the unsecured claim arising by virtue of the Debtor's rejection of the Spectacolor Contract and the administrative claims of Spectacolor Inc. arising from the Spectacolor Contract.

1.33. "Stipulation" means that certain stipulation by and between the Debtor and BAII fixing the BAII Allowed Secured Claim at $19 million pursuant to Section 506(a) of the Bankruptcy Code.

1.34. "Van Wagner Contract" means that certain sign management agreement dated on or about October 24, 1989 pursuant to which the Debtor engaged Van Wagner as exclusive representative with respect to the exploitation, management and sale of designated outdoor advertising on the Property for a period of five

(5) years commencing March 7, 1995 and expiring March 6, 2000.

1.35 "Van Wagner Signage Management Allowed Claim" means the unsecured claim arising by virtue of the Debtor's rejection of the Van Wagner Contract and the administrative claims of Van Wagner arising from the Van Wagner Contract.

ARTICLE II

CLASSIFICATION OF CLAIMS

2.01 *Allowed Claims* The Allowed Claims against the Debtor are divided into the following Classes: CLASSES

2.01.1 *Class 1* shall consist of: All Allowed Administrative Claims except as provided in Classes 4 and 5.

2.01.2 *Class 2* shall consist of: All Allowed Priority Claims except as provided for in Classes 4 and 5.

2.01.3 *Class 3* shall consist of: All Allowed Priority Tax Claims.

2.01.4 *Class 4* shall consist of: The Allowed Secured Claim of BAII.

2.01.5 *Class 5* shall consist of: The Spectacolor Signage License Allowed Claim and the Van Wagner Signage Management Allowed Claim.

2.01.6 *Class 6* shall consist of: All Allowed Unsecured Claims including the Deficiency Claim except as provided for in Class 5.

2.01.7 *Class 7* shall consist of: The Allowed Claims of Insiders.

2.01.8 *Class 8* shall consist of: All Allowed Interests.

ARTICLE III

IDENTIFICATION OF CLASSES OF CLAIMANTS IMPAIRED OR UNIMPAIRED UNDER THE PLAN

3.01. Allowed Administrative Claims (Class 1), Allowed Priority Claims (Class 2), and Allowed Priority Tax Claims (Class 3) are not impaired under the Plan.

3.02. BAII Allowed Secured Claim (Class 4), Spectacolor Signage License Allowed Claim and Van Wagner Signage Management Allowed Claim (Class 5), Allowed Unsecured Claims (Class 6), and Allowed Claims of Insiders (Class 7) are impaired under the Plan.

3.03. Allowed Interests (Class 8) will not be impaired.

3.04. In the event of a controversy as to whether any claimant or class of claimants are impaired under the Plan, the Court shall, after notice and a hearing, determine such controversy.

3.05. The Debtor shall provide all claimants entitled to vote with a form of ballot approved by the Court to be used in casting a vote on the Plan. The ballot shall designate the class in which the Debtor believes a particular claim belongs.

ARTICLE IV

TREATMENT OF CLASSES OF CLAIMANTS UNDER THE PLAN

4.01. Class 1 Claims are not impaired. The holders of Class 1 Claims shall be paid in full on the Effective Date, unless otherwise agreed to by the parties.

4.02. Class 2 Claims are not impaired. The holders of Class 2 Claims shall be paid in full on the Effective Date, unless otherwise agreed to by the parties.

4.03. Class 3 Claims are not impaired.

4.04 Class 4 is impaired. This claim totals $19,000,000.
(A) If the BAII Allowed Claim is not equitably subordinated to all other claims pursuant to § 510 (c) of the Code then the Debtor shall pay the BAII Allowed Secured Claim as follows: (i) principal and interest on nineteen million ($19,000,000) dollars, the stipulated value of the BAII Allowed Secured Claim, over ten (10) years based upon a thirty (30) year amortization rate with a balloon payment at the end of year ten (10). Payments over the ten (10) year period are to be made in equal monthly installments. The interest rate shall either be *fixed* at the Libor rate plus four (4%) percent based upon the one (1) month Libor rate existing on the date hereof or will *float* at the Libor rate plus one and three quarters (1.75%) percent, whichever is preferable to the Court (it should be noted that the existing contract rate is Libor plus 1.5%). It is anticipated that, based on the assumptions described in Exhibit "D", the annual fixed payments to BAII on account of its Allowed Secured Claim shall be approximately $1,517,000 thus aggregating approximately $15,169,000 over the ten (10) year period. In addition, additional principal payments (pursuant to Section 4.04 (A)(ii) herein) as well as a final balloon payment will be made during these ten (10) years and are projected in Exhibit "D" to be $3,870,000 and $11,841,000 respectively. Thus, the total payments projected in Exhibit "D" to be made towards the $19,000,000 BAII Allowed Secured Claim will approximate $30,880,000. The first payment is to

be made one (1) month from the Effective Date of the Plan.

(ii) The Debtor projects that it will spend approximately $5,565,000 towards capital improvements and leasing costs over the next ten (10) years, with approximately sixty (60%) percent of that amount being spent in the first three (3) years. The Debtor anticipates that after the first three (3) year period of the Capital Improvements Plan has been completed that, due to the Debtor's plans to increase revenues and decrease expenses, there will be a surplus of monies from the rental stream after payment of debt service (as described in Section 4.04 (A)(i)) and operating expenses. From this surplus, the Debtor will first establish a reserve fund for working capital of five hundred thousand ($500,000) dollars.

Thereafter, if there are surplus funds from the rental stream after payment of debt service, operating expenses and the establishment of the reserve fund, BAII shall receive an additional twenty five (25%) percent of this surplus to be applied to the reduction of the balance of the principal owed on the BAII Allowed Secured Claim.

(iii) The BAII Deficiency Claim will be treated as a Class 6 Claim.

(iv) To the extent the BAII Allowed Claim is secured by the value of the Debtor's property, which amount has been stipulated to be nineteen million ($19,000,000) dollars, BAII shall retain a lien of the value of BAII's interest in the estate's interest in such property.

(B) If BAII elects to have its entire Allowed Claim treated as a secured claim pursuant to §1111(b) of the

Code, then BAII shall receive the same distribution as described in § 4.04(A)(i), (ii) and (iv) but shall not receive any payment on its Deficiency Claim as a Class 6 Claim.

(C) If the BAII Allowed Claim is equitably subordinated to all other claims pursuant to § 510(c) of the Code, then the lien which secures BAII's claim and encumbers the Debtor's property will be transferred to the estate. In addition, BAII will receive the following treatment in full and complete satisfaction of its Allowed Claim:

(i) The BAII Allowed Secured Claim will be reduced from $19,000,000 to $18,182,745 and will be paid over ten (10) years at a rate of $1,000,000 per year, paid in equal annual installments, with a balloon payment of $9,182,745 at the end of year ten (10)(an additional $817,255 will be paid to BAII for its Class 6 Claim bringing the total payments to BAII to $19,000,000). No interest will be paid on this claim. At any time after the Effective Date but before the expiration of the ten (10) year period the Debtor may opt to pay the balance of the amount owed on this claim without penalty.

(ii) The BAII Deficiency Claim will be treated as a Class 6 Claim.

4.05 Class 5 is impaired. These claims aggregate $3,000,000. The Debtor shall pay the Class 5 Claims as follows: (i) *Two and one-half (2.50%) percent* of the amount of the Claim, without interest, to be *paid over a ten (10) year period in equal annual installments*, the first payment to be made on the Effective Date, and the ten (10) subsequent payments on a yearly basis thereafter (thus, there will actually be two (2) payments

made in the first year, one on the Effective Date and one on the last day of the first year).

4.06. Class 6 is impaired. These claims aggregate approximately $11,000,000.

The Debtor shall pay the Allowed Unsecured Claims as follows:

Seven and one-half (7.50%) percent of the allowed amount of the Unsecured Claims, without interest, to be *paid over a five (5) year period in six equal annual installments*, the first payment to be made on the Effective Date, and the five (5) subsequent payments on a yearly basis thereafter (thus, there will actually be two (2) payments made in the first year, one on the Effective Date and one on the last day of the first year).

4.07. Class 7 is impaired. The holder of a Class 7 Claim will receive nothing towards its claim of over $500,000. These claims arise from the fact that, as part of the BAII mortgage agreement, certain principals of the Debtor would be due a commission for the addition of new signage on OTS subsequent to the placement of the mortgage. Such principals, although rightfully due such commissions, have all along voluntarily deferred receipt so as not to tax the estate.

4.08. Class 8 is not impaired. However, in addition to the forgiveness of over $500,000 of Class 7 Claims (Class 7 Claimants are also holders of Class 8 Claims), the holder(s) of a Class 8 Claim will contribute or cause to be contributed *$1,300,000 in cash on or before the Effective Date, plus commit to fund an additional $1,097,000* (should it be needed as projected in the ten (10) year cash flow projection shown in Exhibit "D") as further consideration in order to satisfy the

substantial contribution exception to the absolute priority rule. The *total potential $2,397,000 contribution* will be contributed as follows: an estimated $300,000 will be paid on or before the Effective Date to the holders of Class 1 Claims; $143,754 will be paid to the Class 5 and 6 Claim Holders on the Effective Date; and $856,246 will be placed in a property escrow to be used initially to fund the Debtor's leasing and improvement plan on the Effective Date. In order to fund potential operating deficits projected in years 2 and 3 of the cash projection in Exhibit "D", on the first anniversary of the Effective Date, a projected $550,000 may be placed in escrow for the funding of the then upcoming second year of the Plan (such $550,000 contribution may be reduced by any property cash existing on that date or increased if the current projection proves to be short); a projected $547,000 may be placed in escrow on the second anniversary of the Effective Date for the funding of the then upcoming third year of the Plan (such $547,000 contribution may be reduced by any property cash existing on that date or increased if the current projection proves to be short). The holder of a Class 8 Interest shall retain his interest without any equity participation dilution from that which was in existence on the Filing Date.

ARTICLE V

POTENTIAL CRAM-DOWN OF NON-CONSENTING CLASSES

5.01. If any Class or Classes of creditors fails to accept the Plan, the Debtor intends to seek confirmation of the Plan over the dissenting Class or Classes rejection of

the Plan by invoking the so-called "cram-down" provisions of the Bankruptcy Code (11 U.S.C. §1129(b)).

The Interest Holder (Class 8) shall retain his interest without any equity participation dilution from that which was in existence on the Filing Date. In such event, and to the extent necessary, the Interest Holder will commit to make or cause to be made a substantial contribution of $1,300,000 in cash on or before the Effective Date and an additional potential contribution of $1,097,000 thereafter (*see* Section 4.08 hereof) in order to consummate the Plan in accordance with the absolute priority rule set forth in the Bankruptcy Code. In addition, the Interest Holders (who are also Class 7 Claimants) will totally forgive their Class 7 Claims amounting to over $500,000. In the event the Court refuses to impose a "cram-down" on the rights of a non-consenting Class unless certain modifications are made to the terms and conditions of such non-consenting Class' treatment under the Plan, the Debtor reserves the right, without re-solicitation, to propose such modification to such non-consenting Class' treatment and to confirm the Plan, provided such modification does not result in total extinguishment of the non-consenting Class' claim. In addition, modifications required by the Court as a condition to confirmation of the Plan shall not be deemed material unless such required modification results in a total extinguishment of such non-consenting Class' rights.

5.02. In the event that BAII elects to have its entire Allowed Claim treated as a secured claim pursuant to § 1111(b) of the Code then, in accordance with §§ 1111 and 1129(a)(7)(B) of the Code, this Plan provides that BAII will retain interests in the estate's property that is not

less than the value of its interest in the estate's property that secures such claim.

ARTICLE VI

TIME OF DISTRIBUTION UNDER THE PLAN

6.01. *Time of Distribution Under the Plan.*

Payments and Distributions to be made by the Debtor on the Effective Date of the Plan shall be made on that date, except as otherwise provided for in the Plan, or as may be ordered by the Court.

6.02. *Payment Dates.*

Whenever any payment or distribution to be made under the Plan shall be due on a day other than a Business Day, such payment or distribution shall instead be made, without interest, on the next Business Day.

6.03. *Manner of Payments Under the Plan.*

Payments to be made by the Debtor pursuant to the Plan shall be made in cash, by check drawn on a domestic bank or by wire transfer from a domestic bank.

6.04. *Fractional Cents.*

Any other provision of the Plan to the contrary notwithstanding, no payments of fractions of cents will be made. Whenever any payment of a fraction of a cent would otherwise be called for, the actual payment shall reflect a rounding of such fraction to the nearest whole cent (up or down).

6.05. *Unclaimed Cash.*

Except as otherwise provided herein, in the event any entity fails to claim any cash within six (6) months from

the date such cash is distributed, such entity shall forfeit all rights thereto, and to any and all future payment, and thereafter the Claim for which such cash was distributed shall be treated as a Disallowed Claim. In this regard, distributions to Claimants entitled thereto shall be sent to their last known address set forth on a proof of claim filed with the Court or if no proof of claim is filed, on the schedules filed by the Debtor, or to such other address as may be designated by a Claimant.

6.06. *Disputed Payments or Distributions*

In the event of any dispute between and among Claimants (including the entity or entities asserting the right to receive the disputed payment or distribution) as to the right of any entity to receive or retain any payment or distribution to be made to such entity under the Plan, the Debtor may, in lieu of making such payment or distribution to such entity, make it instead into an escrow account or to a disbursing agent, for payment or distribution as ordered by a Court of competent jurisdiction or as the interested parties to such dispute may otherwise agree among themselves.

6.07. *No Cash Payments of Less than One Dollar ($1.00)*

If a cash payment otherwise provided for by the Plan to or for the account of any Claimant in respect of any class of Allowed Claims would be less than one dollar ($1.00), notwithstanding any contrary provision of the Plan, no such payment will be made and the Debtor will retain such funds for its own purposes rather than distribute such funds under the Plan.

ARTICLE VII

RELEASE, PAYMENT AND EXTINGUISHMENT OF LIENS AND ENCUMBRANCES

7.01. Except as otherwise specifically provided in this Plan, all claims, liens, encumbrances, causes of action, demands, and lawsuits of any creditors of the Debtor against the Debtor and/or against any property or assets of the Debtor are deemed, as of the Effective Date, to be extinguished, released, compromised, settled and discharged, and paid in full, shall not at any time after such Effective Date be asserted or pursued in any manner against the Debtor or its estate, and shall be payable solely under the Plan, and, on the Effective Date, all creditors shall be enjoined from commencement of any suits, claims, or action against the Debtor or its assets relating to any of the foregoing paid and discharged obligations.

7.02. Vesting of Property to the Debtor

Except as otherwise provided by the Plan, on the Confirmation Date, title to all assets dealt with by the Plan shall pass to the Debtor free and clear of all claims in accordance with Section 1141 of the Bankruptcy Code.

ARTICLE VIII

RIGHTS IF PLAN IS NOT CONFIRMED

8.01. If Confirmation of the Plan does not occur, the Plan shall be deemed null and void, and in such event, nothing contained herein shall be deemed to constitute a waiver or release of any claims by or against the Debtor or any other entity or to prejudice in any manner

the rights of the Debtor or any entity in any further proceedings involving the Debtor.

ARTICLE IX

REJECTION AND ASSUMPTION OF EXECUTORY CONTRACTS

9.01. Any pre-petition executory contract or unexpired lease of the Debtor not expressly rejected, or which is not the subject of a pending application to assume or reject on the Confirmation Date, shall be deemed assumed. Any entity whose claim arises from the rejection of an executory contract or lease shall, to the extent such claim becomes an Allowed Claim, have the rights of a Class 6 Claimant with respect thereto.

ARTICLE X

MEANS FOR EXECUTION OF THE PLAN

10.01. The Plan is to be implemented in a manner consistent with Section 1123 of the Bankruptcy Code.

ARTICLE XI

PROCEDURES FOR RESOLVING DISPUTED CLAIMS

11.01. Time Limit for Objections to Claims

Objections to Claims shall be filed by the Debtor with the Court and served upon each holder of each of the Claims to which objections are made not later than thirty (30) days subsequent to the Confirmation Date or within such other time period as may be fixed by the Court

11.02 Resolution of Disputed Claims

Unless otherwise ordered by the Court, the Debtor shall litigate to judgment, settle or withdraw objections to Disputed Claims, in its sole discretion, without notice to any party in interest.

11.03. Payments

Payments and distributions to each holder of a Disputed Claim that ultimately becomes an Allowed Claim shall be in accordance with the provisions of the Plan with respect to the Class of creditors to which the respective holder of that Allowed Claim belongs. Such payments and distributions shall be made as soon as practicable after the date that the Court enters a Final Order allowing such Claim. Payments made in accordance with this Article shall not include the interest on the amount of such payment from the date on which the holder of the Allowed Claim would have been entitled to receive payment if its Claim had not been a Disputed Claim. Payments shall be made as and when a Disputed Claim has become, in whole or in part, an Allowed Claim or a Disallowed Claim, pursuant to a Final Order or agreement between the Debtor and such Claimant.

ARTICLE XII

RETENTION OF JURISDICTION

12.01. Retention of Jurisdiction

The Court shall retain jurisdiction of these proceedings following the Confirmation Date for the following purposes:

12.01.1 to hear and determine any objections to the allowance of Claims;

12.01.2 to determine any and all applications for compensation for professional and similar fees;

12.01.3 to determine any and all pending applications for the rejection or assumption of executory contracts or for the rejection or assumption and assignment, as the case may be, of leases to which the Debtor is a party or with respect to which it may be liable, and to hear and determine, and if need be, to liquidate, any and all Claims arising therefrom;

12.01.4 to determine any and all applications, adversary proceedings, and contested or litigated matters properly before the Court and pending on the Confirmation Date;

12.01.5 to modify the Plan pursuant to Section 1127 of the Bankruptcy Code or to remedy any defect or omission or reconcile any inconsistency in the Confirmation Order to the extent authorized by the Bankruptcy Code;

12.01.6 to hear and determine all controversies, suits and disputes, if any, as may arise in connection with the interpretation or enforcement of the Plan;

12.01.7 to hear and determine all controversies, suits and disputes, if any, as may arise with regard to orders of this Court in the Chapter 11 Case entered on or before the Confirmation Date;

12.01.8 to hear and determine any and all controversies and disputes arising under, or in connection with the Plan;

12.01.9 to adjudicate all controversies concerning the classification of any Claim;

12.01.10 to liquidate damages in connection with any disputed, contingent or unliquidated Claims;

12.01.11 to adjudicate all Claims to a security or ownership in interest in any property of the Debtor or in any proceeds thereof;

12.01.12 to adjudicate all Claims or controversies arising out of any purchases, sales or contracts made or undertaken by the Debtor during the pendency of the Chapter 11 Case;

12.01.13 to recover all assets and properties of the Debtor wherever located, including the prosecution and adjudication of all causes of action available to the Debtor as of the Confirmation Date;

12.01.14 to determine all questions and disputes regarding recovery of and entitlement to the Debtor's assets and determine all Claims and disputes between the Debtor and any other entity, whether or not subject to an action pending as of the Confirmation Date;

12.01.15 to enter any order, including injunctions, necessary to enforce the title, rights and powers of the Debtor and to impose such limitations, restrictions, terms and conditions on such title, rights and powers as the Court may deem necessary or appropriate;

12.01.16 to enter an order concluding and terminating the Chapter 11 Case; and

12.01.17 to make such orders as are necessary or appropriate to carry out the provisions of the Plan, including but not limited to orders interpreting, clarifying or enforcing the provisions thereof.

ARTICLE XIII

EVENT OF DEFAULT

13.01. The occurrence of any of the following shall constitute a default by the Debtor under the Plan:

(a) failure on the part of the Debtor to make any payment required to be made in accordance with the

provisions of this Plan, which failure remains uncured for a period of thirty (30) days after the Debtor's receipt of written notice from the Claimant due such payment; or

(b) failure on the part of the Debtor to perform or observe any other term or provision set forth in this Plan, which failure remains uncured for a period of thirty (30) day after written notice from the Claimant so affected, unless such failure is by its nature incapable of being cured within the said thirty (30) day period, in which event the Debtor shall not be deemed in default hereunder unless the Debtor fails or refuses to commence such cure within said thirty (30) day period and to diligently prosecute such cure thereafter.

13.02. *Procedures Upon Default*

In the event the Debtor disputes that it is in default, it shall have the right to file a motion in the Court to decide the matter at any time within the applicable cure period set forth in Section 13.01 above. The filing of such motion shall stay the running of the applicable cure period. In the event the Court subsequently determines that the Debtor is in default, then the Debtor shall have fifteen (15) days, or whatever longer period the Bankruptcy Court shall order, following entry of the Order of the Court to cure said default.

13.03. *Remedies*

Upon the occurrence of an Event of Default which continues after all opportunities to cure shall have expired, any party may move for appropriate relief as it may be afforded under the Bankruptcy Code, the Bankruptcy Rules and applicable state law.

ARTICLE XIV

FUTURE MANAGEMENT

14.01 The Debtor shall be managed by an asset manager which is currently Arthur Nevid, the Vice-President of Cosquare, Inc., a general partner of the Debtor, who in turn will oversee the management of OTS by an independent, professional property management firm (currently C.B. Commercial, Inc.).

ARTICLE XV

GENERAL PROVISIONS

15.01. *Modification of the Plan*

The Debtor reserves the right, in accordance with the Bankruptcy Code, to amend or modify the Plan before or after the Confirmation Date.

15.02. *Notices*

All notices, requests, elections or demands in connection with the Plan including any changes of address of any Claimant for the purposes of receiving distributions under the Plan shall be in writing and shall be deemed to have been given when received or, if mailed, five (5) days after the date of mailing provide such writing shall have been sent by registered or certified mail, postage prepaid, return receipt requested, and if sent to the Debtor, addressed to:

One Times Square Associates Limited
Partnership
One Times Square
New York, New York 10036
Attn: Mr. Arthur Nevid

with a copy to:

Shaw, Licitra, Parente, Esernio & Schwartz, P.C.
1010 Franklin Avenue
Garden City, New York 11530
(516) 742-0610
Attn: Stuart I. Gordon, Esq.

All notices and requests to Claimants of any class shall be sent to them at their last known address. The Debtor and any Claimant of any class may designate, in writing, any other address for purposes of this Section 15.02, which designation shall be effective upon receipt.

15.03. *Severability*

Should any provision in the Plan be determined to be unenforceable, such determination shall in no way limit or affect the enforceability and operative effect of any and all other provisions of the Plan.

15.04. *Governing Law*

Except to the extent that the Bankruptcy Code is applicable, the rights and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with, the laws of the State of New York.

15 .05. *Successors and Assigns*

The rights and obligations of any entity named or referred to in the Plan shall be binding upon, and shall inure to the benefit of, the successors and assigns of such entity.

15.06. *Reservation of Rights*

Nothing contained herein shall prohibit the Debtor from prosecuting or defending any of its rights as may exist on its own behalf.

15.07 *Disbursing Agent*

The Debtor shall act as its own disbursing agent under the Plan and shall establish such account or accounts as may be required to effectuate payments as provided for in the Plan.

Dated: New York, New York
July 15, 1992

ONE TIMES SQUARE ASSOCIATES
LIMITED PARTNERSHIP
signature/Arthur Nevid
Arthur Nevid, Vice President of General
Partner of the Debtor

SHAW, LICITRA, PARENTE,
ESERNIO & SCHWARTZ, P.C.
Attorneys for the Debtor and Debtor in
Possession
signature/Stuart I. Gordon
Stuart I. Gordon (SIG 3536)
A Member of the Firm
1010 Franklin Avenue
Garden City, New York 11530
(516) 742-0610

APPENDIX H

United States Bankruptcy Court

SOUTHERN DISTRICT OF NEW YORK

In re:

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

Chapter 11
Case No. 92 B 41471 (CB)

DEBTOR'S ALTERNATIVE PLAN OF REORGANIZATION PURSUANT TO MOTION FOR REARGUMENT/RECONSIDERATION

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP, the above-captioned debtor (the "Debtor"), proposes the following plan of reorganization (the "Plan") pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Section 1121(a).

ARTICLE I

DEFINITIONS

For purposes of this Plan, the following terms shall have the respective meanings as hereinafter set forth (such meanings to be equally applicable to the singular and plural forms of the terms defined, unless the context otherwise requires). Capitalized terms used in this Plan shall at all times refer to the terms as defined in this Article I.

1.01. "Administrative Claim" means a claim for any cost or expense of administration of the Chapter 11 case

allowed under Section 503(b) and 507(a)(1) of the Bankruptcy Code, *including*, without limitation,

(i) any actual and necessary costs and expenses of preserving the Debtor's estate and of operating the Debtor's business (other than such claims or portions thereof which, by their express terms, are not due or payable by the Effective Date);

(ii) all allowances of compensation for legal or other professional services or reimbursement of costs and to the extent allowed by the Court under Sections 330, 331 or 503 of the Bankruptcy Code or otherwise allowed by the Court; and

(iii) all fees and charges issued against the Debtor's estate pursuant to Section 1930 of Title 28, United States Code.

1.02. "Allowed Administrative Claim" means all or that portion of any Administrative Claim which is an Allowed Claim.

1.03. "Allowed Claim" means a claim which (a) has been allowed by a Final Order; or (b) has been scheduled by the Debtor and is not scheduled as disputed, contingent or unliquidated, and as to which no objection to the allowance thereof has been interposed within the period of limitation fixed by the Bankruptcy Code, the Bankruptcy Rules or by Court order. "Allowed Claim" shall not include interest on the amount of the Claim except with respect to an Allowed Secured Claim as permitted by Section 506(b) of the Bankruptcy Code.

1.04. "Allowed Interest" means an Interest as to which no objection to the allowance thereof has been interposed within the applicable period of limitation fixed by the

Bankruptcy Code, the Bankruptcy Rules or by Court order.

1.05. "Allowed Priority Claim" means that portion of an Allowed Claim which is entitled to priority status pursuant to Sections 507(a)(3) and 507(a)(4) of the Bankruptcy Code.

1.06. "Allowed Priority Tax Claim" means that portion of an Allowed Claim which is entitled to priority status pursuant to Section 507(a)(7) of the Bankruptcy Code.

1.07. "Allowed Unsecured Claim" means any Allowed Claim that is not an Allowed Administrative Claim, Allowed Priority Claim, Allowed Priority Tax Claim, or an Allowed Deficiency Claim.

1.08. "BNP Allowed Claim" means the Allowed Claim of Banque Nationale de Paris ("BNP").

1.08.1 "BNP Allowed Secured Claim" means that portion of BNP's Allowed Claim that is secured by the value fixed by the Stipulation.

1.09. "Bankruptcy Code" means Title 11 of the United States Code, as the same may hereafter be amended.

1.10. "Bankruptcy Rules" means the Rules of Bankruptcy Procedure which govern procedure in cases under the Bankruptcy Code.

1.11. "Business Day" means any day other than a Saturday, Sunday or legal holiday as such term is defined in Bankruptcy Rule 9006(a).

1.12. Capital Improvement Plan means the Debtor's plan for improving and upgrading the property, in which the Debtor projects to spend approximately fifty-three (53%) percent of a total ten (10) year capital

expenditure projection of approximately $4,815,000 during the first three (3) years.

1.13. "Chapter 11" means Chapter 11 of the Bankruptcy Code.

1.14. "Chapter 11 Case" means *In re One Times Square Associates Limited Partnership*, Case No. 92 B 41471 (CB), currently pending before the Court.

1.15. "Claim" means a claim against the Debtor as defined in Section 101(5) of the Bankruptcy Code; *to wit:* the (a) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.16. "Claimant" means the holder of a Claim.

1.17. "Confirmation" means entry of an order by the Court approving the Plan in accordance with Chapter 11.

1.18. "Confirmation Date" means the date upon which the Court enters an order confirming the Plan in accordance with Chapter 11.

1.19. "Confirmation Order" means the Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11.

1.20. "Court" means the United States Bankruptcy Court for the Southern District of New York, or such other court as may have jurisdiction over the Debtor's Chapter 11 case.

1.21. "Debtor" means One Times square Associates Limited Partnership, which filed a voluntary petition for reorganization on March 11, 1992.

1.22. "Deficiency Claim" means that portion of the Allowed BNP Claim which is not secured by the value of the Property.

1.23. "Disallowed Claim" means any claim or portion thereof that has been disallowed by a Final Order of the Court.

1.24. "Disputed Claim" means (a) any claim or portion of a claim (other than an Allowed Claim) which is scheduled by the Debtor as disputed, contingent or unliquidated, or (b) a claim which has been filed pursuant to Section 501(a) of the Bankruptcy Code as unliquidated or contingent, or (c) a claim which has been filed pursuant to Section 501(a) of the Bankruptcy Code and as to which an objection to the allowance thereof has been interposed within the time limitation fixed by the Bankruptcy Code, by an order of the Court, or by this Plan, which objection has not been determined, in whole or in part, by a Final Order.

1.25. "Effective Date" means the first Business Day which is the date ten (10) days after the Confirmation Order becomes a Final Order.

1.26. "Filing Date" means March 11, 1992.

1.27. "Final Order" means an order or judgment as to which order or judgment (or any revision, modification or amendment thereof) (a) the time to appeal or seek review, rehearing, reargument or certiorari has expired and as to which no appeal or petition for review, rehearing, reargument or certiorari proceeding is pending, or (b) an order or judgment which has been

appealed, has been affirmed on appeal and as to which appeal the time for further appeal has expired.

1.28. "Interest" means an equity holder of the Debtor.

1.29. "Plan" means this Plan of Reorganization as modified or amended from time to time as and to the extent permitted herein or by the Bankruptcy Code.

1.30. "Property" means the fee and commercial office building thereon known as One Times Square, New York, New York 10036.

1.31. "Spectacolor Contract" means that certain license agreement dated April 26, 1982 between TSNY Realty Corp. and Spectacolor Inc. wherein TSNY Realty Corp. licensed to Spectacolor Inc. right to maintain an electronic advertising display panel on a certain portion of space on the exterior facade of the Property commencing May 1, 1982.

1.32. "Spectacolor Signage License Allowed Claim" means the unsecured claim arising by virtue of the Debtor's rejection of the Spectacolor Contract and the administrative claims of Spectacolor Inc. arising from the Spectacolor Contract.

1.33. "Stipulation" means that certain stipulation by and between the Debtor and Banque Arabe et Internationale D' Investissement ("BAII"), BNP's predecessor in interest, fixing the BNP Allowed Secured Claim at $19 million pursuant to Section 506(a) of the Bankruptcy Code.

1.34. "Van Wagner Contract" means that certain sign management agreement dated on or about October 24, 1989 pursuant to which the Debtor engaged Van Wagner as exclusive representative with respect to the

exploitation, management and sale of designated outdoor advertising on the Property for a period of five (5) years commencing March 7, 1995 and expiring March 6, 2000.

1.35 "Van Wagner Signage Management Allowed Claim" means the unsecured claim arising by virtue of the Debtor's rejection of the Van Wagner Contract and the administrative claims of Van Wagner arising from the Van Wagner Contract.

ARTICLE II

CLASSIFICATION OF CLAIMS

2.01. *Allowed Claims*

The Allowed Claims against the Debtor are divided into the following Classes:

CLASSES

2.01.1 *Class 1* shall consist of:

All Allowed Administrative Claims except as provided in Classes 4 and 5.

2.01.2 *Class 2* shall consist of:

All Allowed Priority Claims except as provided for in Classes 4 and 5.

2.01.3 *Class 3* shall consist of:

All Allowed Priority Tax Claims.

2.01.4 *Class 4* shall consist of:

The Allowed Secured Claim of BNP.

2.01.5 *Class 5* shall consist of:

The Deficiency Claim.

2.01.6 *Class 6* shall consist of:

All Allowed Unsecured Claims including the Spectacolor Signage License Allowed Claim and the Van Wagner Signage Management Allowed Claim.

2.01.7 *Class 7* shall consist of:

The Allowed Claims of Insiders.

2.01.8 *Class 8* shall consist of:

All Allowed Interests.

ARTICLE III

IDENTIFICATION OF CLASSES OF CLAIMANTS IMPAIRED OR UNIMPAIRED UNDER THE PLAN

3.01. Allowed Administrative Claims (Class 1), Allowed Priority Claims (Class 2), and Allowed Priority Tax Claims (Class 3) are not impaired under the Plan.

3.02. BNP Allowed Secured Claim (Class 4), Deficiency Claim (Class 5), Allowed Unsecured Claims (Class 6), and Allowed Claims of Insiders (Class 7) are impaired under the Plan.

3.03. Allowed Interests (Class 8) are not impaired under the Plan.

3.04. In the event of a controversy as to whether any claimant or class of claimants are impaired under the Plan, the Court shall, after notice and a hearing, determine such controversy.

3.05 The Debtor shall provide all claimants entitled to vote with a form of ballot approved by the Court to be used in casting a vote on the Plan. The ballot shall designate the class in which the Debtor believes a particular claim belongs.

ARTICLE IV

TREATMENT OF CLASSES OF CLAIMANTS UNDER THE PLAN

4.01 Class 1 Claims are not impaired. The holders of Class 1 Claims shall be paid in full on the Effective Date, unless otherwise agreed to by the parties.

4.02. Class 2 Claims are not impaired. The holders of Class 2 Claims shall be paid in full on the Effective Date, unless otherwise agreed to by the parties.

4.03. Class 3 Claims are not impaired.

4.04 Class 4 is impaired. This claim totals $19,000,000.

The Debtor shall pay the BNP Allowed Secured Claim as follows (described in more detail in Exhibit "1" hereto):

(i) interest at the rate of eight (8%) percent on the unamortized balance of the BNP Allowed Secured Claim payable monthly over the ten (10) year life of the Plan. The total interest payments over said ten (10) year period will be $13,000,000.

(ii) with respect to principal, $1,000,000 will be immediately paid on the Effective Date (to be paid from the Debtor's proposed new value capital contribution) and then mandatory amortization payments beginning in year 4 of the Plan as follows: $500,000 in year 4 and then increases of $200,000 per year thereafter for the life of the Plan (so that $1,700,000 of amortization will be due in year 10). The total mandatory amortization payments over the ten (10) year period of the Plan will be $7,700,000.

The foregoing payments will leave an unamortized balance at the end of year 10 of $10,300,000, which will be paid in a balloon payment either through sale or refinance of the Property.

(iii) The Deficiency Claim will be treated as a Class 5 Claim.

(iv) To the extent the BNP Allowed Claim is secured by the value of the Debtor's property, which amount has been stipulated to be nineteen million ($19,000,000) dollars, BNP shall retain a lien of the value of BNP's interest in the estate's interest in such property

(v) BNP will also receive an "equity kicker" in the Property's upside if the Property is sold within the first ten (10) years equal to ten (10%) percent of any net proceeds above $19,000,000.

(B) If BNP elects to have its entire Allowed Claim treated as a secured claim pursuant to §1111(b) of the Code, then BNP shall receive the same distribution as described in §4.04(A)(i), (ii) and (iv) but shall not receive any payment on its Deficiency Claim as a Class 5 Claim.

4.05. Class 5 is impaired. This claim equals $10,896,738.

The Debtor shall pay the Class 5 Claim as follows: seven and one-half (7.5%) percent of the amount of the Claim, without interest, as follows: $270,000.00 immediately on the Effective Date from the Debtor's new value capital contribution and then $109,451.00 on the last day of years 1, 2, 3, 4, and 5 of the Plan (thus, there will be a total of $379,451.00 paid in the first year of the Plan).

4.06. Class 6 is impaired. These claims aggregate $3,058,144.00.

The Debtor shall pay the Allowed Unsecured Claims as follows: seven and one-half (7.5%) percent of the amount of the Claims, without interest, over a five (5) year period as follows: $45,872.00 on the last day of years 1, 2, 3, 4, and 5 of the Plan.

4.07. Class 7 is impaired. The holder of a Class 7 Claim will receive nothing towards its claim of over $500,000.

These claims arise from the fact that, as part of the BNP mortgage agreement, certain principals of the Debtor would be due a commission for the addition of new signage on OTS subsequent to the placement of the mortgage. Such principals, although rightfully due such commissions, have all along voluntarily deferred receipt so as not to tax the estate.

4.08. Class 8 is not impaired. However, in addition to the forgiveness of over $500,000 of Class 7 Claims (Class 7 Claimants are also holders of Class 8 Claims), the holder(s) of a Class 8 Claim will contribute or cause to be contributed $2,270,000 to be contributed as follows: $1,000,000 will be paid on the Effective Date to BNP on account of its Allowed Secured Claim (Class 4); $270,000.00 will be paid to BNP as the holder of the Class 5 Claim on the Effective Date; $350,000.00 will be paid on or before the Effective Date to the holders of Class 1 Claims; $170,000.00 will be reserved on the Effective Date for operating expenses; $155,323.00 will be paid to the holders of Class 5 and 6 Claims at the end of the year 1 of the Plan; $84,677.00 will be reserved at the end of year 1 for operating expenses; $155,323.00 will be paid to the holders of Class 5 and Class 6 Claims at the end of year 2 of the Plan; and

$84,677.00 will be reserved at the end of year 2 for operating expenses.

As a result of the foregoing, $1,580,646, or seventy (70%) percent of the $2,270,000 total new value contribution, will be paid to the Debtor's creditors (excluding Class 1 Claims).

In addition to the foregoing new value contribution, BNP will receive an "equity kicker" in the upside of the Property if it is sold within the first ten (10) years equal to ten (10%) percent of the net sales proceeds above $19,000,000.

The holder of a Class 8 Interest shall retain his interest without any equity participation dilution from that which was in existence on the Filing Date other than the ten (10%) percent "equity kicker" given to BNP.

ARTICLE V

POTENTIAL CRAM-DOWN OF NON-CONSENTING CLASSES

5.01. If any Class or Classes of creditors fails to accept the Plan, the Debtor intends to seek confirmation of the Plan over the dissenting Class or Classes rejection of the Plan by invoking the so-called "cram-down" provisions of the Bankruptcy Code (11 U.S.C. §1129(b)).

The Interest Holder (Class 8) shall retain his interest without any equity participation dilution from that which was in existence on the Filing Date other than the "equity kicker" given to BNP. In such event, and to the extent necessary, the Interest Holder will commit to make or cause to be made a substantial contribution of $2,270,000 in cash (see Section 4.08 hereof) in order to consummate the Plan in accordance with the absolute

priority rule set forth in the Bankruptcy Code. In addition, the Interest Holders (who are also Class 7 Claimants) will totally forgive their Class 7 Claims amounting to over $500,000. In the event the Court refuses to impose a "cram-down" on the rights of a nonconsenting Class unless certain modifications are made to the terms and conditions of such non-consenting Class' treatment under the Plan, the Debtor reserves the right, without re-solicitation, to propose such modification to such non-consenting Class' treatment and to confirm the Plan, provided such modification does not result in total extinguishment of the non-consenting Class' claim. In addition, modifications required by the Court as a condition to confirmation of the Plan shall not be deemed material unless such required modification results in a total extinguishment of such non-consenting Class' rights.

5.02. In the event that BNP elects to have its entire Allowed Claim treated as a secured claim pursuant to § 1111(b) of the Code then, in accordance with §§ 1111 and 1129(a)(7)(B) of the Code, this Plan provides that BNP will retain interests in the estate's property that is not less than the value of its interest in the estate's property that secures such claim.

ARTICLE VI

USE OF FUNDS IN RECEIVER'S OPERATING ACCOUNT

6.01. The Debtor will use the approximately $1,500,000 in the operating account presently maintained by Rebecca Rawson, temporary receiver of the Property, to create a reserve for outstanding pre and/or post-petition real estate taxes, if any, operating expenses and capital improvements to the Property, as required.

ARTICLE VII

TIME OF DISTRIBUTION UNDER THE PLAN

7.01. *Time of Distribution Under the Plan*

Payments and Distributions to be made by the Debtor on the Effective Date of the Plan shall be made on that date, except as otherwise provided for in the Plan, or as may be ordered by the Court.

7.02. *Payment Dates*

Whenever any payment or distribution to be made under the Plan shall be due on a day other than a Business Day, such payment or distribution shall instead be made, without interest, on the next Business Day.

7.03. *Manner of Payments Under the Plan*

Payments to be made by the Debtor pursuant to the Plan shall be made in cash, by check drawn on a domestic bank or by wire transfer from a domestic bank.

7.04. *Fractional Cents*

Any other provision of the Plan to the contrary notwithstanding, no payments of fractions of cents will be made. Whenever any payment of a fraction of a cent would otherwise be called for, the actual payment shall reflect a rounding of such fraction to the nearest whole cent (up or down).

7.05. *Unclaimed Cash*

Except as otherwise provided herein, in the event any entity fails to claim any cash within six (6) months from the date such cash is distributed, such entity shall forfeit all rights thereto, and to any and all future payment, and thereafter the Claim for which such cash was distributed shall be treated as a Disallowed Claim. In this regard,

distributions to Claimants entitled thereto shall be sent to their last known address set forth on a proof of claim filed with the Court or if no proof of claim is filed, on the schedules filed by the Debtor, or to such other address as may be designated by a Claimant.

7.06. *Disputed Payments or Distributions*

In the event of any dispute between and among Claimants (including the entity or entities asserting the right to receive the disputed payment or distribution) as to the right of any entity to receive or retain any payment or distribution to be made to such entity under the Plan, the Debtor may, in lieu of making such payment or distribution to such entity, make it instead into an escrow account or to a disbursing agent, for payment or distribution as ordered by a Court of competent jurisdiction or as the interested parties to such dispute may otherwise agree among themselves.

7.07. *No Cash Payments of Less than One Dollar ($1.00)*

If a cash payment otherwise provided for by the Plan to or for the account of any Claimant in respect of any class of Allowed Claims would be less than one dollar ($1.00), notwithstanding any contrary provision of the Plan, no such payment will be made and the Debtor will retain such funds for its own purposes rather than distribute such funds under the Plan.

ARTICLE VIII

RELEASES, PAYMENT AND EXTINGUISHMENT OF LIENS AND ENCUMBRANCES

8.01. Except as otherwise specifically provided in this Plan, all claims, liens, encumbrances, causes of action, demands, and lawsuits of any creditors of the Debtor

against the Debtor and/or against any property or assets of the Debtor are deemed, as of the Effective Date, to be extinguished, released, compromised, settled and discharged, and paid in full, shall not at any time after such Effective Date be asserted or pursued in any manner against the Debtor or its estate, and shall be payable solely under the Plan, and, on the Effective Date, all creditors shall be enjoined from commencement of any suits, claims, or action against the Debtor or its assets relating to any of the foregoing paid and discharged obligations.

8.02. Vesting of Property to the Debtor

Except as otherwise provided by the Plan, on the Confirmation Date, title to all assets dealt with by the Plan shall pass to the Debtor free and clear of all claims in accordance with Section 1141 of the Bankruptcy Code.

ARTICLE IX

RIGHTS IF PLAN IS NOT CONFIRMED

9.01. If Confirmation of the Plan does not occur, the Plan shall be deemed null and void, and in such event, nothing contained herein shall be deemed to constitute a waiver or release of any claims by or against the Debtor or any other entity or to prejudice in any manner the rights of the Debtor or any entity in any further proceedings involving the Debtor.

ARTICLE X

REJECTION AND ASSUMPTION OF EXECUTORY CONTRACTS

10.01. Any pre-petition executory contract or unexpired lease of the Debtor not expressly rejected, or which is not the subject of a pending application to assume or reject on the Confirmation Date, shall be deemed assumed. Any entity whose claim arises from the rejection of an executory contract or lease shall, to the extent such claim becomes an Allowed Claim, have the rights of a Class 6 Claimant with respect thereto.

ARTICLE XI

MEANS FOR EXECUTION OF THE PLAN

11 01. The Plan is to be implemented in a manner consistent with Section 1123 of the Bankruptcy Code

ARTICLE XII

PROCEDURES FOR RESOLVING DISPUTED CLAIMS

12.01. *Time Limit for Objections to Claims*

Objections to Claims shall be filed by the Debtor with the Court and served upon each holder of each of the Claims to which objections are made not later than thirty (30) days subsequent to the Confirmation Date or within such other time period as may be fixed by the Court.

12.02. *Resolution of Disputed Claims*

Unless otherwise ordered by the Court, the Debtor shall litigate to judgment, settle or withdraw objections to Disputed Claims, in its sole discretion, without notice to any party in interest.

12.03. *Payments*

Payments and distributions to each holder of a Disputed Claim that ultimately becomes an Allowed Claim shall be in accordance with the provisions of the Plan with respect to the Class of creditors to which the respective holder of that Allowed Claim belongs. Such payments and distributions shall be made as soon as practicable after the date that the Court enters a Final Order allowing such Claim. Payments made in accordance with this Article shall not include the interest on the amount of such payment from the date on which the holder of the Allowed Claim would have been entitled to receive payment if its Claim had not been a Disputed Claim. Payments shall be made as and when a Disputed Claim has become, in whole or in part, an Allowed Claim or a Disallowed Claim, pursuant to a Final Order or agreement between the Debtor and such Claimant.

ARTICLE XIII

RETENTION OF JURISDICTION

13.01. *Retention of Jurisdiction*

The Court shall retain jurisdiction of these proceedings following the Confirmation Date for the following purposes:

13.01.1 to hear and determine any objections to the allowance of Claims;

13.01.2 to determine any and all applications for compensation for professional and similar fees;

13.01.3 to determine any and all pending applications for the rejection or assumption of executory contracts or for the rejection or assumption and assignment, as the case

may be, of leases to which the Debtor is a party or with respect to which it may be liable, and to hear and determine, and if need be, to liquidate, any and all Claims arising therefrom;

13.01.4 to determine any and all applications, adversary proceedings, and contested or litigated matters properly before the Court and pending on the Confirmation Date;

13.01.5. to modify the Plan pursuant to Section 1127 of the Bankruptcy Code or to remedy any defect or omission or reconcile any inconsistency in the Confirmation Order to the extent authorized by the Bankruptcy Code;

13.01.6 to hear and determine all controversies, suits and disputes, if any, as may arise in connection with the interpretation or enforcement of the Plan;

13.01.7 to hear and determine all controversies, suits and disputes, if any, as may arise with regard to orders of this Court in the Chapter 11 Case entered on or before the Confirmation Date;

13.01.8 to hear and determine any and all controversies and disputes arising under, or in connection with the Plan;

13.01.9 to adjudicate all controversies concerning the classification of any Claim;

13.01.10 to liquidate damages in connection with any disputed, contingent or unliquidated Claims;

13.01.11 to adjudicate all Claims to a security or ownership in interest in any property of the Debtor or in any proceeds thereof;

13.01.12 to adjudicate all Claims or controversies arising out of any purchases, sales or contracts made or undertaken

by the Debtor during the pendency of the Chapter 11 Case;

13.01.13 to recover all assets and properties of the Debtor wherever located, including the prosecution and adjudication of all causes of action available to the Debtor as of the Confirmation Date;

13.01.14 to determine all questions and disputes regarding recovery of and entitlement to the Debtor's assets and determine all Claims and disputes between the Debtor and any other entity, whether or not subject to an action pending as of the Confirmation Date;

13.01.15 to enter any order, including injunctions, necessary to enforce the title, rights and powers of the Debtor and to impose such limitations, restrictions, terms and conditions on such title, rights and powers as the Court may deem necessary or appropriate;

13.01.16 to enter an order concluding and terminating the Chapter 11 Case; and

13.01.17 to make such orders as are necessary or appropriate to carry out the provisions of the Plan, including but not limited to orders interpreting, clarifying or enforcing the provisions thereof.

ARTICLE XIV

EVENT OF DEFAULT

14.01. The occurrence of any of the following shall constitute a default by the Debtor under the Plan:

(a) failure on the part of the Debtor to make any payment required to be made in accordance with the provisions of this Plan, which failure remains uncured for a period of thirty (30) days after the Debtor's receipt

of written notice from the Claimant due such payment; or

(b) failure on the part of the Debtor to perform or observe any other term or provision set forth in this Plan, which failure remains uncured for a period of thirty (30) days after written notice from the Claimant so affected, unless such failure is by its nature incapable of being cured within the said thirty (30) day period, in which event the Debtor shall not be deemed in default hereunder unless the Debtor fails or refuses to commence such cure within said thirty (30) day period and to diligently prosecute such cure thereafter.

14.02. *Procedures Upon Default*

In the event the Debtor disputes that it is in default, it shall have the right to file a motion in the Court to decide the matter at any time within the applicable cure period set forth in Section 14.01 above. The filing of such motion shall stay the running of the applicable cure period. In the event the Court subsequently determines that the Debtor is in default, then the Debtor shall have fifteen (15) days, or whatever longer period the Bankruptcy Court shall order, following entry of the Order of the Court to cure said default.

14.03. *Remedies*

Upon the occurrence of an Event of Default which continues after all opportunities to cure shall have expired, any party may move for appropriate relief as it may be afforded under the Bankruptcy Code, the Bankruptcy Rules and applicable state law.

ARTICLE XV

FUTURE MANAGEMENT

15.01 The Debtor shall be managed by an asset manager who in turn will oversee the management of OTS by an independent, professional property management firm (currently C.B. Commercial, Inc.).

ARTICLE XVI

GENERAL PROVISIONS

16.01. *Modification of the Plan*

The Debtor reserves the right, in accordance with the Bankruptcy Code, to amend or modify the Plan before or after the Confirmation Date.

16.02. *Notices*

All notices, requests, elections or demands in connection with the Plan including any changes of address of any Claimant for the purposes of receiving distributions under the Plan shall be in writing and shall be deemed to have been given when received or, if mailed, five (5) days after the date of mailing provide such writing shall have been sent by registered or certified mail, postage prepaid, return receipt requested, and if sent to the Debtor, addressed to:

One Tines Square Associates
Limited Partnership
c/o OTC Realty Management Corp.
108 New South Road
Hicksville, New York 11801
Attn: Mr. Gary Calmenson

with a copy to:

Shaw, Licitra, Parente, Esernio& Schwartz, P.C.
1010 Franklin Avenue
Garden City, New York 11530
(516) 742-0610
Attn: J. Stanley Shaw, Esq.

All notices and requests to Claimants of any class shall be sent to them at their last known address. The Debtor and any Claimant of any class may designate, in writing, any other address for purposes of this Section 16.02, which designation shall be effective upon receipt.

16 .03. *Severability*

Should any provision in the Plan be determined to be unenforceable, such determination shall in no way limit or affect the enforceability and operative effect of any and all other provisions of the Plan.

16.04. *Governing Law*

Except to the extent that the Bankruptcy Code is applicable, the rights and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with, the laws of the State of New York

16.05. *Successors and Assigns*

The rights and obligations of any entity named or referred to in the Plan shall be binding upon, and shall inure to the benefit of the successors and assigns of such entity.

16.06. *Reservation of Rights*

Nothing contained herein shall prohibit the Debtor from prosecuting or defending any of its rights as may exist on its own behalf.

16.07 *Disbursing Agent*

The Debtor shall act as its own disbursing agent under the Plan and shall establish such account or accounts as may be required to effectuate payments as provided for in the Plan.

Dated: New York, New York
November 2, 1993

ONE TIMES SQUARE
ASSOCIATES LIMITED
PARTNERSHIP
By: signature/Gary Calmenson
Gary Calmenson, Officer of OTC
Realty Management Corp.

SHAW, LICITRA, PARENTE,
ESERNIO & SCHWARTZ, P.C.,
Attorneys for the Debtor and Debtor
in Possession
BY: signature/J. Stanley Shaw
J. Stanley Shaw (JSS-0977)
A Member of the Firm
1010 Franklin Avenue
Garden City, New York 11530
(516) 742-0610

APPENDIX I

Judiciary—Procedure 28 § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub.L. 100-352 § 2(a), (b), 102 Stat. 662.)

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Bankruptcy Code, Title 11

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on

account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2630.



Bankruptcy Code, Title 11

§ 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an

amount that the court approves as reasonable and necessary for administrative convenience.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2631.



Bankruptcy Code, Title 11

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable;

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of

the plan, the holder of such claim will receive on account of such claim cash equal to the amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in

section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2635; Pub.L. 98-353, Title III, § 512, July 10, 1984, 98 Stat. 386; Pub.L. 99-554, Title II, §§ 225, 283(v), Oct. 27, 1986, 100 Stat. 3102, 3118; Pub.L. 100-334, § 2(b), June 16, 1988, 102 Stat. 613.

(2)

Supreme Court, U.S.
FILED
JAN 19 1995
OFFICE OF THE CLERK

No. 94-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In re:
ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

vs.

BANQUE NATIONALE DE PARIS,

Respondent,

NORMA ORTIZ,

Trustee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BANQUE NATIONALE DE PARIS

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QUESTIONS PRESENTED

1. In light of the Court's recent decision to deny the petition for a writ of certiorari in *Boston Post Road Ltd. Partnership v. Federal Deposit Insurance Corp. (In re Boston Post Road Limited Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert. denied*, __ U.S. __ (No. 94-442, Jan. 17, 1995), does the Second Circuit's *per curiam*, unpublished opinion in this case, in which the Second Circuit merely followed *Boston Post Road* on an essentially identical set of facts, present an issue of sufficient importance to warrant consideration on the merits by this Court?

2. Given the fact that the bankruptcy reorganization plan proposed by the Debtor in this case did *not* separately classify the "deficiency" claim of its undersecured mortgagee, does this case present an appropriate occasion for the Court to consider the arguments, advanced by the Petitioner, that such separate classification is mandated by the Bankruptcy Code?

3. Where the bankruptcy court found, in factual findings that were affirmed as not "clearly erroneous," that the Debtor's separate "classification" of one group of its unsecured creditors "serves no legitimate purpose" and was done "*solely* to create a separate, non-insider impaired class guaranteed to accept the [Reorganization] Plan" (A50, emphasis supplied), should this Court consider the Debtor's arguments that are premised on the contrary factual proposition that "overriding legitimate reasons for separate classification" had been demonstrated at the confirmation hearing?

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No. 94-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In re:

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

vs.

BANQUE NATIONALE DE PARIS,

Respondent,

NORMA ORTIZ,

Trustee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BANQUE NATIONALE DE PARIS

Respondent Banque Nationale de Paris ("BNP" or the "Bank") submits this brief in opposition to the petition of One Times Square Associates Limited Partnership ("OTS" or the

"Debtor") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT

1. This case arises from the bankruptcy court's decision to lift the "automatic stay" imposed by the Bankruptcy Code to allow the Bank to proceed with a foreclosure sale of OTS's only significant asset, a commercial office building that was mortgaged to the Bank to secure a loan that has been in default since 1991.

2. The Bank's predecessor in interest[1] loaned OTS approximately $28 million. This loan was secured by a mortgage on the Debtor's real property located at One Times Square in New York City. OTS defaulted on the loan, and in October, 1991, the Bank initiated foreclosure proceedings against OTS in the New York Supreme Court.

3. On March 11, 1992, OTS filed a bankruptcy petition pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Pursuant to Section 362 of the Bankruptcy Code, this filing automatically stayed the Bank from proceeding with its foreclosure action. Thereafter, the Bank and OTS entered into a stipulation in the bankruptcy court that allowed the Bank to go forward with the foreclosure action through the entry of judgment with the understanding that the Bank would return to the bankruptcy court to seek further relief from the automatic stay before conducting a foreclosure sale. A

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[1] The loan to OTS was originally made by BNP's subsidiary, Banque Arabe et Internationale d'Investissement ("BAII"). During the course of the litigation, BAII assigned the loan to BNP. For convenience, BNP and BAII are interchangeably referred to as the "Bank," except where the context requires otherwise.

judgment of foreclosure and sale was ultimately entered in the state trial court on April 8, 1993.

4. In July, 1992, OTS filed a proposed plan of reorganization (the "Plan") in the bankruptcy court. Although OTS argues in this Court that, as a matter of law, the Bank's undersecured "deficiency" claim must be placed in a separate "class" of creditors, the Plan proposed by OTS did *not* classify the Bank's claim separately from OTS's general class of unsecured creditors. Instead, OTS grouped the Bank's deficiency claim with other unsecured creditors, and sought to classify separately the claims of two advertising "signage" companies whose existing contractual arrangements with OTS were being rejected and renegotiated as part of the proposed Plan.

5. The Bank opposed confirmation of the Debtor's Plan on a number of grounds and moved for complete relief from the automatic stay. The bankruptcy court conducted a 10-day evidentiary hearing, and held that the proposed Plan did not meet the requirements of the Bankruptcy Code for three separate reasons.

6. First, the bankruptcy court found that OTS's scheme for the classification of creditors was improper because the separate classification of the signage companies "serves no legitimate purpose in the financial restructuring of the Debtor" and was done "solely to create a separate, non-insider impaired class guaranteed to accept the Plan." (A50). Second, the bankruptcy court held that the proposed Plan was not "fair and equitable" to the Bank because it did not provide for payments to the Bank with a present value equal to the $19 million stipulated value of the Bank's security interest in the Debtor's real property, as required by Section 1129(b)(2)(A) of the Bankruptcy Code. Third, the bankruptcy court held that the additional capital which OTS's partners were proposing to inject into the reorganized Debtor was too insubstantial to

allow the partners to retain their equity interests under the purported "new value" exception to the Bankruptcy Code's "absolute priority" rule.

7. Having denied confirmation on these three alternative grounds, the bankruptcy court granted the Bank's motion to lift the automatic stay so the Bank could proceed with its foreclosure sale.

8. On November 5, 1993, OTS moved for reconsideration or reargument of the bankruptcy court's decision. Appended to its motion papers was a so-called "Alternative Plan" of reorganization that, *inter alia*, proposed for the first time to place the Bank's unsecured deficiency claim in a separate class of creditors. On November 17, 1993, the bankruptcy court entered an order adhering in all respects to its original decision. OTS has never submitted a proposed disclosure statement for the Alternative Plan; never asked its creditors to vote on it; and never sought a confirmation hearing, all of which are prerequisites under the Bankruptcy Code to determining whether the Alternative Plan can be confirmed.

9. OTS appealed the bankruptcy court's decision to the United States District Court for the Southern District of New York. Because the denial of confirmation of the Debtor's original Plan did not foreclose the possibility that the Debtor might ultimately confirm the Alternative Plan or some other reorganization plan, the bankruptcy court's denial of confirmation, in itself, was interlocutory and non-appealable.[2] However, the notice of appeal properly brought before the district court the issue of whether the bankruptcy court abused its discretion by granting the Bank relief from the automatic

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[2] *See In Re Mcorp Fin. Inc.*, 139 B.R. 820, 822 (S.D. Tex. 1992); *Collier on Bankruptcy* ¶ 3.03, 3-197 (15 Ed. 1993).

stay.[3] On March 31, 1994, the district court affirmed the bankruptcy court's order lifting the automatic stay on the grounds that OTS had adopted a creditor classification scheme for the improper purpose of "gerrymandering" its creditors' vote on confirmation of the Plan. The district court found it unnecessary to reach the two alternative grounds for denying confirmation on which the bankruptcy court based its order.

10. OTS further appealed to the United States Court of Appeals for the Second Circuit. The court of appeals affirmed on September 27, 1994 in an unpublished, *per curiam* opinion of no precedential effect. The court of appeals based its affirmance in this case on its recent holding in *Boston Post Road Ltd. Partnership v. Federal Deposit Ins. Corp. (In Re Boston Post Road Ltd. Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert. denied*, __ U.S.__ (No. 94-442, Jan. 17, 1995), in which the Second Circuit adopted the prevailing majority view that separate classification of creditors' claims is improper when undertaken for the purpose of securing the affirmative vote of an "impaired" class of claims to allow a debtor to "cram down" the confirmation of its plan of reorganization.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. In its decision in the *Boston Post Road* case, the Second Circuit joined the Third, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits in holding that in bankruptcy reorganization cases, creditors' claims "may not be separately

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[3] *See Lomas Fin. Corp. v. Northern Trust Co. (In re Lomas Fin. Corp.)*, 932 F.2d 147, 151 (2d Cir. 1991); *Sonnax Indus. v. Tri Component Prods. Corp. (In re Sonnax Indus. Inc.)*, 907 F.2d 1280, 1284 (2d Cir. 1990).

classified solely to engineer an assenting impaired class" to allow confirmation by "cramdown" of the debtor's plan of reorganization. 21 F.3d at 482.[4] In the case now before this Court on the pending petition, the Second Circuit merely applied the rule of *Boston Post Road*, based on the bankruptcy court's factual finding that OTS had separately classified the two signage companies' claims solely to "gerrymander" the confirmation vote to obtain approval from at least one "impaired" class. This Court has now denied the petition for a writ of certiorari in *Boston Post Road*, and the Second Circuit's decision in this case, which is unpublished and may not be cited as authority under the Second Circuit's rules (*see* A4); is of no precedential effect; adds nothing to the holding previously allowed to stand unreviewed by this Court in *Boston Post Road*; and is of insufficient importance to merit plenary review by the Court.

2. OTS argues that this Court should issue a writ of certiorari to resolve the purported conflict between the Second Circuit and other Courts of Appeal listed above, and the decision of the Seventh Circuit in *In re Woodbrook Associates*, 19 F.3d 312 (7th Cir. 1994). *Woodbrook* does indeed contain a discussion suggesting that the separate classification of an undersecured mortgagee's non-recourse

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[4] In so holding, the Second Circuit followed these prior decisions of its sister circuits: *In re Jersey City Medical Center*, 817 F.2d 1055 (3d Cir. 1987); *Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496 (4th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 191 (1992); *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III)*, 995 F.2d 1274 (5th Cir. 1991), *cert. denied*, __ U.S. __, 113 S. Ct. 72 (1992); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581 (6th Cir. 1986); *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310 (8th Cir. 1987); *Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.)*, 913 F.2d 873 (11th Cir. 1990).

deficiency claim is *mandatory* under the Bankruptcy Code, regardless of the debtor's intent to "gerrymander" voting on its plan of reorganization. However, there is no compelling reason in this case for resolving this "conflict" between the circuits because (1) the discussion in *Woodbrook* is technically *dicta*, since the Seventh Circuit affirmed the denial of confirmation of the debtor's plan of reorganization on other grounds and (2) this is not the typical case of conflicting circuit court authority because no fewer than seven of the twelve courts of appeal have held that creditor classification for the purpose of "gerrymandering" voting on reorganization plans is impermissible under the Bankruptcy Code. In this context, the Seventh Circuit decision in *Woodbrook* is clearly aberrational, and its precedential value will in all likelihood be limited to that single Circuit. To the extent that future panels of the Seventh Circuit feel obliged to follow *Woodbrook*'s *dicta*, this Court, should it so desire, will have the opportunity to resolve the conflict in an appropriate future case arising in that Circuit.

3. This case, however, is clearly *not* an appropriate vehicle for resolving the purported conflict between the Seventh Circuit and the seven other circuits, for the simple reason that OTS did *not* employ the classification scheme that the Seventh Circuit suggested was mandatory under the Bankruptcy Code. The Plan which the Debtor presented to the bankruptcy court did *not* separately classify the Bank's undersecured deficiency claim from the general class of unsecured general creditors, as OTS now argues is required by the *Woodbrook* decision. Instead, OTS separately classified the two signage companies' claims, arguing unsuccessfully that their "unique" continuing interest in the future operation of the One Times Square property justified their separate creditor status. It was only after the bankruptcy court rejected OTS's arguments and found, as a factual matter, that OTS's only motive for separately classifying the

signage companies was to gerrymander the confirmation voting that OTS brought forward its Alternative Plan, separately classifying the Bank's deficiency claim. However, as discussed above, OTS never obtained a ruling from the bankruptcy court on whether the Alternative Plan was confirmable, and no evidentiary hearing was even held to determine whether, as OTS now claims, the Alternative Plan in fact corrected any of the three fatal defects the bankruptcy court identified in the original Plan. This Court should not adjudicate whether the Alternative Plan complies with the requirements of the Bankruptcy Code, when the issue of whether the Alternative Plan can be confirmed has not even been tried by the bankruptcy court.

4. Not only does this case fail to present squarely the issue of whether a mortgagee's undersecured deficiency claim must be separately classified, but granting a writ of certiorari would unfairly prejudice the Bank, whose efforts to foreclose on its mortgage have already been delayed for over three years, without raising any realistic prospect that OTS will ultimately obtain relief from the bankruptcy court's decision to lift the automatic stay. The Bank has noticed a foreclosure sale for January 24, 1995, so this case will become moot unless this Court or the Second Circuit issues a stay of that sale. Any stay application, however, would raise the issue of OTS's probability of success on the merits, not only on the classification issue, but on the ultimate issue of whether the bankruptcy court abused its discretion in lifting the automatic stay, after the bankruptcy court had found that the Debtor's original Plan violated the Bankruptcy Code on not one, but *three*, independent grounds. Although the lower appellate courts found it unnecessary to consider any issue but classification, the bankruptcy court's holdings that the Plan was not "fair and equitable" and that the Plan violated the "absolute priority" rule were more than adequate to sustain its decision to lift the automatic stay, even assuming *arguendo*

that the bankruptcy court and the lower appellate courts erred in rejecting OTS's classification scheme. This, then, is not an appropriate case for the issuance of a writ of certiorari because OTS would not be entitled to relief from the bankruptcy court's order lifting the stay even if this Court granted certiorari and reversed the lower courts' decision on the classification issue raised in OTS's petition.

5. Finally, there is no merit in OTS's argument that this Court should issue a writ of certiorari to consider whether separate classification of the signage companies is justified by "overriding legitimate reasons." As indicated above, the bankruptcy court expressly found, as a factual matter, that OTS's classification scheme served *no* legitimate purpose, and the lower appellate courts affirmed this finding as not clearly erroneous. Obviously, this Court ought not exercise its jurisdiction merely to review alleged errors in the lower courts' factual findings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 19, 1995

No. 94-1126 (3)

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SUPPLEMENTAL BRIEF IN OPPOSITION AND SUGGESTION OF MOOTNESS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION AND SUGGESTION OF MOOTNESS

Pursuant to Rule 15.7, respondent Banque Nationale de Paris (the "Bank") submits this supplemental brief in opposition to the petition for a writ of certiorari of petitioner One Times Square Associates Limited Partnership ("OTS").

The Bank respectfully calls to the Court's attention the following matters that have intervened since the filing of its Brief in Opposition, and suggests that the case is now moot.

1. As the Court is aware, this case arises from the lower courts' decisions lifting the "automatic stay" applicable under the Bankruptcy Code to allow the Bank to proceed with a foreclosure sale of OTS's single significant asset, a commercial office building located at One Times Square in New York City.

2. At the time the Bank's Brief in Opposition was filed on January 19, 1995, there was pending before this Court OTS's application for a stay of the foreclosure sale pending disposition of the certiorari petition.

3. Thereafter, on January 20, 1995, Justice Ginsburg entered an order denying that stay application.

4. In the absence of a stay, OTS's building was sold at a regularly conducted foreclosure sale on January 24, 1995.

5. Under New York law, the foreclosure sale terminated OTS's equity of redemption in the building, and assuming *arguendo* that the automatic stay were reimposed, it would not void the sale or prevent the conveyance of the building to the purchaser at the foreclosure. *In re Cretella*, 47 B.R. 382 (E.D.N.Y. 1984); *In re Liggett*, 118 B.R. 213 (Bankr. S.D.N.Y. 1990); *In re Butchman*, 4 B.R. 379 (Bankr. S.D.N.Y. 1980).

6. Accordingly, it is respectfully suggested that this matter is moot.

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